

**RETHINKING CIVIL JUSTICE:
RESEARCH STUDIES FOR
THE CIVIL JUSTICE REVIEW**

ONTARIO LAW REFORM COMMISSION

VOLUME 1



1996

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The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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**Ontario
Law Reform
Commission**

The Honourable Charles Harnick
Attorney General for Ontario


Dear Attorney:

I have the honour to submit our study papers on civil justice entitled
Rethinking Civil Justice: Research Studies for the Civil Justice Review.

A handwritten signature in black ink, appearing to read "John D. McCamus".

John D. McCamus
Chair

December, 1996



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PREFACE

These two volumes are comprised of research papers examining various aspects of the administration of civil justice and its reform, which earlier were submitted to the Ontario Civil Justice Review. The papers were prepared for the Fundamental Issues Group of the Ontario Civil Justice Review. The Ontario Civil Justice Review is a joint initiative of the government of Ontario and the Ontario Court of Justice (General Division). Established in April of 1994, the Review has been co-chaired by the Honourable Robert Blair, a Justice of the Ontario Court (General Division) and the Assistant Deputy Attorney General, Courts Administration, Sandra Lang. Ms. Lang was succeeded in turn by Assistant Deputy Attorney General, Public Law and Policy, Marc Rosenberg and then by Ms. Lang's successor as Assistant Deputy Attorney General, Courts Administration, Heather Cooper. The mandate of the Review was to develop an overall strategy for making the administration of civil justice within the province speedier, less complex and less costly for litigants, and for maximizing the effectiveness of public spending on civil justice. The Review has discharged its responsibilities principally through the publication of its First Report in March of 1995 and its Supplemental and Final Report in November of 1996.

The Review also established a study group, styled the Fundamental Issues Group, which was to reflect upon issues of the longer term. The Group was asked to consider such questions as the following. Which civil disputes ought to be decided by adjudicative processes before courts? Which disputes could or ought to be decided by other public bodies such as administrative agencies, or by other decisional processes such as mediation? For disputes resolved by private mechanisms, what rules or supervision might be desirable? What fundamental reforms might be considered to simplify, expedite, make more efficient and promote access to publicly funded decision-making mechanisms? The Group attempted to explore these and related issues through a series of public consultations and through the commissioning of a series of research and study papers.

The Group was co-chaired by the Director of the Policy Development Branch of the Ministry of the Attorney General, initially J. Douglas Ewart and subsequently Sandra Wain, and by John D. McCamus, Chair of the Ontario Law Reform Commission. Although the Civil Justice Review is not, in any sense, a project of the Ontario Law Reform Commission, it was nonetheless anticipated that the Commission might contribute in some fashion to the work of the Review by undertaking special projects from time to time. The other members of the Group were Madam Justice Jean MacFarland, of the Ontario Court of Justice (General Division), Terrence O'Sullivan of the Ontario Bar and Judith Webb of London, Ontario, Principal of George Ross Secondary School.

The first step undertaken by the Group was to commission a background paper that would identify and analyze the critical policy issues entailed in a fundamental reconsideration of civil disputing in Ontario. Our hope was to produce a document that would stimulate reflection and focus attention on modifications of the system of civil justice that might be implemented within the near future. Additionally, we hoped that a paper of this kind could bring to a wider audience the benefits and insights that can be drawn from the tremendous array of academic research that has been undertaken in the field of civil disputing by legal scholars and by academic researchers in other disciplines. This project was undertaken for the Group by Professor Roderick A. Macdonald of the Faculty of Law of McGill University and the resulting paper was published by the Ontario Law Reform Commission in 1995 under the title, "Study Paper on Prospects for Civil Justice". A group of distinguished Canadian, American and English experts in the civil justice field were asked to prepare written comments on the Macdonald paper and those commentaries were published together with the paper itself.

At the same time, the Group undertook a series of consultations with a variety of interested groups, including those representing racial minorities, the disabled, women, francophones, aboriginal people, the alternative dispute resolution community, and business and consumer groups. The information and insights gathered from those consultations are summarized in the paper prepared by Sandra Wain, of the Ministry of the Attorney General, which is included in the present volume.

On the basis of these deliberations and consultations, the Group identified a number of topics that, in its view, would benefit from more intensive study. In this endeavour, the Group was much assisted by the contribution of Professor Michael J. Trebilcock of the Faculty of Law of the University of Toronto, who both assisted in the shaping and commissioning of the papers and coordinated and supervised their preparation.

Three papers were undertaken by colleagues in the Policy Branch of the Ministry of the Attorney General, Sandra Wain, Larry Fox and John Twohig. Ms. Wain examined the available evidence relating to public perceptions of the administration of civil justice. Mr. Fox gathered together empirical evidence relating to the current operation of the system of administrative justice in Ontario. Mr. Twohig was the principal researcher in a project which mounted an empirical study of the workload of the civil courts over the past few decades.

A further series of commissioned papers grappled with the related questions of firstly, whether the creation of a right to make civil claims is the only or the preferable device for regulating conduct of various kinds and secondly, assuming

that a decision to select this means of regulation has been taken, which types of civil claims are appropriate for the courts as opposed to other modes of adjudication. Professor Trebilcock and his colleague, Professor Robert Howse, considered the role of civil justice as one of a possible range of instruments of governance. Professor Lorraine Eisenstat Weinrib of the Faculty of Law of the University of Toronto and Professor Martha Jackman of the Faculty of Law, University of Ottawa, prepared papers examining the role of the courts in the resolution of civil disputes and the appropriateness of reallocating disputes either to the courts or to administrative agencies.

Another series of papers examined possibilities for reforming adjudicative processes both in the civil courts and in the system of administrative justice in Ontario. Professor Kent Roach of the Faculty of Law of the University of Toronto, prepared a paper examining various models for fundamental reform to civil litigation in the courts. Allan Stitt, Frances Handy and Peter A. Simm of the Ontario Bar examined the potential role for alternative dispute resolution in the civil justice system. Professor Iain Ramsay, of Osgoode Hall Law School of York University, examined the role and operation of the small claims courts. A paper considering a possible range of fundamental reforms to the administrative justice system was prepared by Margot Priest of the Ontario Bar.

Finally, various issues relating to the barriers to access to civil justice that impede effective use of the civil justice system by disadvantaged groups was prepared by Ian Morrison of the Clinic Resource Office and Professor Janet Mosher of the Faculty of Law of the University of Toronto.

In addition to the foregoing papers, the present volumes contain an overview of the research findings set forth in the papers. The overview was prepared by Professor Trebilcock and is intended to make the work of the Fundamental Issues Group more conveniently accessible both to those involved in the administration and reform of civil justice and, of course, to the broader community.

Publication of these papers, it is hoped, will assist in informing public debate and government policy-making with respect to reform of the civil justice system over the longer term. Many of the proposals set forth in these research studies raise challenging and complex policy issues that cannot be resolved on a once and for all time basis. Nonetheless, our appreciation of those complexities and our ability to craft appropriate solutions to the problems faced in the civil justice field will be enhanced by the efforts of the accomplished group of researchers who prepared these papers on the Group's behalf.

On behalf of the Group, I should like to extend our warm appreciation to the authors of these papers and to Professor Trebilcock, whose stewardship of this particular aspect of our work was extraordinarily helpful. Members of the Group

are also very grateful to the many individuals who participated in our series of consultations. Names of the invitees to the various sessions are set out in an appendix to the paper prepared by Sandra Wain reproduced in this volume. As well, we are grateful to the Civil Justice Review which supported this work and, more particularly, the publication of the present volumes. As well, the staff of the Ontario Law Reform Commission has been of considerable assistance. Our Chief Administrator, Mary Lasica, handled the administrative arrangements concerning the commissioning of this work and our Commission secretaries, Tina Afonso and Cora Calixterio, discharged their responsibilities with their usual finesse. More particularly, we express appreciation to Ms. Calixterio for the burdensome work involved in converting the various manuscripts into their published form.

Finally, I should note that the views and recommendations expressed in these papers are those of the authors themselves and do not necessarily represent the views of the Civil Justice Review, the Ontario Law Reform Commission or the Ministry of the Attorney General.

December, 1996

John D. McCamus
Chair

LIST OF CONTRIBUTORS

Carl Baar is a Professor of Politics at Brock University in St. Catharines, Ontario, where he has taught since 1974. He holds M.A. and Ph.D. degrees from the University of Chicago, and was a Russell Sage Fellow at Yale Law School in 1970-71. He has published, lectured and consulted widely in the field of judicial administration. His books include *Separate but Subservient* (1975) and *Judicial Administration in Canada* (1981, with Perry S. Millar). His major reports cover topics such as court organization (*One Trial Court*, Canadian Judicial Council, 1991), caseload management (*Caseload Management Policy Options for Victorian Courts*, Melbourne, 1988), criminal court delay (1982 and 1984 studies for the Department of Justice Canada) and civil case backlog (*The Reduction and Control of Civil Case Backlog in Ontario*, Advocates Society, 1994). He collaborated with Chief Justice Jules Deschenes in the 1981 report, *Maitres chez eux/Masters in their own house*.

Lawrence M. Fox, Counsel, Policy Branch, Public Law and Policy Division, Ministry of the Attorney General of Ontario, graduated from the Faculty of law, University of Toronto in 1976, and was admitted to the Ontario Bar in 1978. He was employed as a research lawyer with Ontario's Commission on Freedom of Information and Individual Privacy until the fall of 1979, when he joined the legal staff of the Ontario Law Reform Commission. Mr. Fox served with the Commission until August, 1991, when he joined the Policy Branch. While at the Ontario Law Reform Commission, Mr. Fox worked on diverse topics, including class actions, the law of standing, human artificial insemination and other issues relating to reproductive technologies, and the administration of estates of deceased persons. Mr. Fox has taught legal research and writing at the Bar Admission Course and is the author of a number of articles on costs and standing.

Frank J.F. Handy practices Alternative Dispute Resolution (ADR) and litigation at Stitt Feld Handy Houston in Toronto, a firm which has ADR as its primary focus. Mr. Handy received his LL.B. in 1988 from the University of Windsor Law School. Since completing his law degree, he has participated in various continuing education courses and seminars including the Advanced Negotiation Course at the Program of Instruction for Lawyers conducted by Harvard Law School. Mr. Handy has assisted teaching courses in Negotiation at the University of Toronto Law School, and has designed and taught Certificate workshops in ADR under the auspices of the University of Windsor Faculty of Law.

Mr. Handy has helped to resolve numerous disputes in Commercial, Competition, Environmental, Municipal, Land Use Planning and Development matters. He has participated in multi-party negotiations for both individual,

corporate, and government clients involving issues related to development proposals and government approvals. In addition, he has conducted administrative hearings in such disputes, and in regulatory offenses. Mr. Handy is also a Chairperson of the Unemployment Insurance Appeal Board of Referees for Toronto South, where he presides over arbitration style hearings of appeals related to legal disputes over the interpretation of the *Unemployment Insurance Act* and Regulations and the entitlement to benefits.

Robert Howse is an Associate Professor of Law at the University of Toronto, where he has taught since 1990. He was born in Toronto in 1958 and educated at the University of Toronto (B.A., LL.B.) and at Harvard Law School (LL.M). A former Canadian public servant, Professor Howse held a number of positions in the Department of Foreign Affairs from 1983-1986. Professor Howse teaches and/or has published widely in the areas of international trade law and adjustment policy, Canadian federalism, regulatory reform, privatization, and legal and political philosophy. He is the author of *Economic Union, Social Justice and constitutional Reform: Towards a High but Level Playing Field* (1992) and co-author or co-editor of three other books and more than 20 scholarly articles. Professor Howse is currently working on a study on the impact of globalization on democracy and community in North America and Europe, and on a number of collaborative projects concerned with rethinking the role of government for the 21st century. He was recently named an Adjunct Scholar of the C.D. Howe Institute.

Professor Howse has frequently been retained as a consultant to the public sector. In 1994, he served on the Panel on the Truth and Reconciliation Commission in the Republic of South Africa. He has been involved in initiatives on law reform in Eastern Europe, and most participated in a project on fiscal federalism in New Delhi, India under the auspices of the Canadian International Development Agency and the conference Board of Canada. During the 1992 Constitutional Referendum, Professor Howse co-founded the Canada for All Canadians NO Committee, and co-authored with Deborah Coyne the committee's manifesto, "No Deal." Professor Howse speaks French fluently and has a basic knowledge of several other European languages.

Martha Jackman is an Associate Professor at the Faculty of Law, University of Ottawa, where she teaches constitutional and public law in the French common law programme. She has written extensively in the areas of administrative law and the *Canadian Charter*, social welfare rights, and the division of powers. She is a co-editor of the *Canadian Journal of Women and the Law/Revue Femmes et Droit* and does research and litigation work on behalf of a number of equality seeking groups on regulatory and constitutional issues.

Anna Meyers received a B.A. from the Université de Montréal in 1991, graduated from Dalhousie Law School in 1994 and worked in England prior to returning to Canada in 1995 to qualify as a lawyer in Ontario. Ms. Myers served her articles with the Policy Division of the Ministry of the Attorney General and a number of sole practitioners practicing in both criminal and civil litigation. She continues to work on various legal research projects in criminal, labour and commercial litigation.

Ian Morrison is the Executive Director of the Clinic Resource Office of the Ontario Legal Aid Plan, a research and resource centre for the 72 community legal clinics in Ontario. He teaches in the area of law and poverty at the Faculty of Law, University of Toronto, and contributes in an annual review of poverty law developments in the *Journal of Law and Social Policy*. He is also active in other social justice and social development issues as a Board member of the Social Planning Council of Metropolitan Toronto as co-Chair of the Ontario Social Safety Network.

Janet Mosher is an Associate Professor, cross-appointed to the faculties of law and social work at the University of Toronto. She is the director of the combined LL.B./M.S.W. program. Her research and teaching interests include violence against women, law and poverty, legal ethics and legal processes.

Anne Marie Predko was an articling student in the Policy Division of the Ministry of the Attorney General during the Civil Justice Review Project. Along with the other authors she visited Toronto court locations, sifted through court records, reviewed files and became intimately familiar with the history of civil procedure. A graduate of the University of Waterloo and Osgoode Hall Law School, she is currently a sole practitioner in Ajax, Ontario.

Margot Priest is a Partner in the Regulatory Consulting Group, Inc. of Ottawa, specializing in economic regulation, administrative justice and regulatory compliance. She has been the Chair and Vice-Chair of two regulatory tribunals, as well as the Chair of the Council of Canadian Administrative Tribunals (CCAT). She was a member of the Communications Committee of the National Association of Regulatory Utility Commissioners (NARUC) and founding Chair of the National Institute for Administrative Tribunals. She has been a senior federal public servant and consultant, working with the Department of Justice, Treasury Board, the Department of Consumer and Corporate Affairs, the House of Commons, and the Regulation Reference of the Economic Council of Canada. She lectures and writes extensively on administrative law and regulation and is the co-author of *Directors' Duties in Canada: Managing Risk*.

Iain Ramsay is Professor of Law at Osgoode Hall Law School, York University. He has published widely in consumer law and policy and recent books include *Advertising, Culture and the Law* (Sweet and Maxwell, Modern Legal Studies, 1996), *Consumer Law in the Global Economy: National and International Dimensions* (ed.) (Dartmouth, 1996), *Consumer Law* (ed.) (International library of Essays in law and Legal Theory, 1992). He has acted as a consultant to provincial and federal governments in Canada, to the Office of Fair Trading and the National Consumer Council in the United Kingdom. He is on the editorial board of the *Journal of Consumer Policy*. He recently completed a study of advertising self-regulation for Industry Canada Office of Consumer Policy, and is currently undertaking a study of the process of individual bankruptcy in Canada, funded by a grant from the Social Sciences and Humanities Research Council of Canada.

Kent Roach is an Associate Professor of Law at the University of Toronto. Professor Roach is a graduate of Yale Law School, a former Law Clerk to the Supreme Court of Canada for Madam Justice Bertha Wilson and a member of the Ontario Bar. He is the author of *Constitutional Remedies in Canada* and the co-editor of *Civil Litigation Cases and Materials*, 4th ed.

Peter A. Simm is a research lawyer, litigator and corporate counsel in private practice in Toronto. As an ADR systems-design consultant, he has advised both public and private-sector clients. Mr. Simm has also performed research and policy analysis for Compensation Issues in Health Care (1990), and the Osborne Inquiry into Motor Vehicle Accident Compensation in Ontario (1988). Under the auspices of the Program on negotiation at Harvard Law School, he co-authored (with Lisa Feld) *Complaint-Mediation in Ontario's Self-Governing Professions* (Waterloo, Ont.: Fund for Dispute Resolution, 1995). His other publications include: a long-term international macroeconomic overview published by the Economic Council of Canada: an analysis of disciplinary mechanisms in the Canadian medical profession; and a study of non-medical professional liability claims.

Allan J. Stitt practices mediation, facilitation, ADR systems design and litigation at Stitt Feld Handy Houston in Toronto. He earned the B. Comm. at the University of Toronto in 1984, the LL.B. at the University of Windsor Law School, the J.D. at the University of Detroit Law School, and an LL.M. at Harvard Law School. He is an Adjunct Professor at the University of Toronto Law School, teaching courses in Negotiation and Alternative Dispute Resolution, and is a Fellow in the Program on Conflict Management and Negotiation at the University of Toronto. Prior to forming his firm with his three partners in 1994, he practiced ADR and commercial litigation at the Toronto firm of Osler, Hoskin & Harcourt.

While at Harvard Law School, he studied negotiation and ADR with Professor Roger Fisher, Professor Frank Sander, and Bruce Patton. In 1994 and 1995, he acted as a Teaching Assistant for Professor Fisher in courses in Negotiation. Mr. Stitt is the Chair of the ADR Section of the Canadian Bar Association (Ontario), and is on the Board of Directors of the Canadian Foundation for Dispute Resolution. He has designed ADR systems for a number of organizations including the Canadian Bankers Association and the College of Physicians and Surgeons of Ontario. He has designed and taught several workshops on both ADR and Negotiation. Mr. Stitt is co-editor of the CCH ADR Practice Manual, and has co-authored a textbook on the Canadian *Income Tax Act*.

Michael J. Trebilcock Professor of Law, Director of the Law and Economics Programme, and Chairman of the International Business and Trade Law Programme at the University of Toronto Law School. He has authored or co-authored *The Common Law of Restraint of Trade* (1986), *Canadian Competition Policy* (1987), *Trade and Transitions: A Comparative Analysis of Adjustment Policies* (1990), and *The Limits of Freedom of Contract* (Harvard University Press, 1993) and is co-author of a forthcoming treatise, *International Trade Regulation* (Routledge, London). The first book was awarded the Walter Owen Prize in 1988.

He has also been associated with various studies on Canadian competition policy, public enterprise in Canada, business bail-outs in Canada, misleading advertising and unfair business practice laws, regulatory reform and the choice of governing instruments, reinventing government, regulation of the professions, trade-related adjustment assistance policies, trade remedy laws, tort reform and the liability insurance crisis, traffic safety regulation, and liability for medical malpractice. He was a member of the Competition Tribunal from 1987 to 1989. He was a Visiting Scholar at the University of Chicago Law School (1976) and Yale Law School (1985). In 1986, he was elected a Fellow of the Royal Society of Canada. In May of 1991 he was named a University Professor at the University of Toronto.

John Twohig, B.A. University of Toronto, LL.B. University of Ottawa, LL.M. Osgoode Hall Law School, Member of the Bar of Ontario. Counsel, Policy Branch, Ministry of the Attorney General.

Sandra Wain has graduate degrees in sociology and history from the University of Toronto and was called to the Ontario Bar in 1982 after serving as a law clerk in the Ontario Court of Appeal. She joined the Ministry of the Attorney General as counsel in the Policy Development and Constitutional Law Divisions in 1984 and was Acting Director of the Policy Branch of the Public Law and Policy Division in 1995.

Lorraine Eisenstat Weinrib, Hon. B.A. 1970 (York University), LL.B. 1973 (University of Toronto), LL.M. 1985 (Yale); member of the Bar of Ontario (1975); Associate Professor, Faculty of Law and Department of Political Science, University of Toronto since 1988. Visiting Professor, Michigan Law School (1993), Hebrew University Faculty of Law (1994), and University of the Witwatersrand Faculty of Law (1995). Formerly Crown Law Officer, Ministry of the Attorney General, 1975-1988 and Deputy Director of Constitutional Law and Policy, Ministry of the Attorney General, 1988. Her scholarship advocates the institutional coherence of the *Canadian Charter of Rights and Freedoms, 1982* and its membership in post-war family of rights-protecting instruments. She has published articles on various areas of constitutional and administrative law, including emergency powers of government, constitutional rights and their limits, the roles of courts and legislatures in protecting rights, and particular rights, e.g., abortion, commercial and hate speech, the right to die. She has co-authored *Canadian Constitutional Law: Cases and Materials* (Toronto: Emond Montgomery, 1992).

OVERVIEW OF CIVIL JUSTICE RESEARCH PAPERS

MICHAEL J. TREBILCOCK

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OVERVIEW OF RESEARCH STUDIES

MICHAEL J. TREBILCOCK

1. PERCEPTIONS OF THE PROBLEM: THE VIEWS OF THE STAKEHOLDERS

SANDRA WAIN, “PUBLIC PERCEPTIONS OF THE CIVIL JUSTICE SYSTEM”

This paper summarizes existing research on public perceptions of the civil justice system. It also reviews the consultations undertaken by the Civil Justice Review and suggests some ways in which perceptions of the system are likely to influence reform proposals.

(a) “INSIDER” PERCEPTIONS

The First Report of Ontario’s Civil Justice Review reflects the view of many court administrators, judges and lawyers that the system is in a state of crisis: dangerously backlogged and desperately in need of reform in order to cut costs, complexity and delay – all of which impede the public’s access to the courts and ultimately pose a threat to the due administration of justice.

This state of crisis is generally perceived to have arisen as the result of a number of long-neglected internal problems: e.g. unnecessarily complicated procedural rules, antiquated court processes, and the absence of a clear and effective management structure. However, the problems that beleaguer the civil justice system are also perceived to be the result of external forces beyond the control of the court system itself: i.e. the development of an excessively adversarial culture, legislation which provides more opportunities to go to court, and an intransigent, “rights-oriented” approach to problems, which promotes litigation of disputes rather than settlement.

These perceptions of the nature and causes of the current problems in the civil justice system form the basis for many of the Report’s recommendations.

(b) PUBLIC PERCEPTIONS

(i) Public Confidence in the Legal System

The sense of “a justice system crisis” which is common among the system’s insiders does not appear to be shared by the general public. Public surveys indicate that civil justice reform is not a “top of the mind” issue for most people (compared to other social and economic issues such as unemployment or crime rates).

If pressed to confront the issue by a persistent pollster, a majority of respondents will express a reasonable level of confidence in the civil justice system. However, these mildly positive perceptions apparently co-exist in the public mind with other, less positive, views. In particular, a majority of respondents to public surveys agree with insiders that the system is too complex, costly and slow. In addition, the public appears to be somewhat sceptical about the ability of the justice system to provide “equal justice”: a majority of respondents to public surveys state that they believe the system favours the rich and the powerful. Members of minority groups (in particular, aboriginal persons and members of other racial minority groups) express less confidence than others in the fairness and justness of the legal system.

(ii) Public Use of the Civil Justice System

Rather than asking people what they think about the civil justice system, some public surveys have asked people to identify the types of legal problems they have had and what they have done in response to them; i.e. why and when they have “turned to the law” to resolve their legal problems.

Surveys of this kind reveal that people do not turn to the formal legal system to solve most of the legal problems they face. The vast majority of legal problems are resolved through alternative means: e.g. doing nothing, employing self-help remedies, using the services of a government agency. The means chosen to deal with any particular problem varies with the type of legal problem being experienced. For example, people who have family law problems usually seek legal assistance, whereas people who have racial discrimination grievances are less likely to do so.

The results of these surveys cast doubt on the view that increases in civil court caseloads can be explained simply by reference to a general cultural shift which encourages litigation over settlement. It is impossible to assess whether people prefer to litigate more now than they did in the past without better information about changes in the actual incidence of legal problems and the availability and use of alternative means for dealing with those problems.

(iii) The Social Context of “Naming, Claiming and Blaming”

Some research has looked more closely at how people make decisions about “naming, blaming and claiming” in response to a legally actionable grievance.

One of the findings arising from this research is that perceptions of the justice systems are not necessarily stable over time: an individual’s views may shift in response to both the kind of problems he or she is facing and social/cultural variables which provide different ways of interpreting, and different opportunities for dealing with, legal problems. Depending on the social and cultural context in which legal problems are experienced, an individual may perceive the justice system as part of a broader (and oppressive) power structure in which “the haves” will invariably come out ahead, or as an effective and authoritative means of resolving a difficult problem.

This research affirms the results of public opinion surveys which have found a somewhat ambivalent and contradictory set of public perceptions. It also suggest that there is a broad array of factors influencing public attitudes to, and use of, the civil justice system. Identifying and controlling these factors is unlikely to be simple or easy.

(iv) Business Perceptions

One of the major gaps in our understanding of public perceptions of the civil justice system is that we do not have much information about how business perceives the system. This is an extremely important knowledge gap given that about 70% of all plaintiffs in Ontario courts are banks, corporations and institutions, some of whom are “repeat players” who use the legal system on a regular basis. There is a need for much better information about business disputing in general and, in particular, about when and why businesses make decisions to resort to legal process to resolve problems. Absent this information, it will be extremely difficult to predict whether reforms intended to reduce civil caseloads are likely to be effective.

(v) User Satisfaction

A few public surveys have attempted to assess whether those who resort to the formal justice system are satisfied with the process.

These surveys have found that user satisfaction with the courts cannot be best predicted by looking at the results of cases, or at the concerns about the system most often identified by system insiders; i.e. cost, complexity and delay. Instead, user satisfaction appears most closely correlated with litigants' impressions of court procedures and processes. In particular, litigants will be most satisfied with the system if they see the proceedings as having been dignified, careful, unbiased and fair. Further, contrary to what might be expected, litigants involved in very formal and highly complex civil litigation do not appear to feel alienated from the proceedings and seem to have a reasonably good understanding of the process.

These results suggest that litigants do not value the legal system simply because it resolves disputes. They put a very high value on having their disputes taken seriously and having the opportunity to put their case before a decision-maker who appears impartial and knowledgeable. Caution should therefore be exercised in making any fundamental procedural reforms to the system which are aimed at reducing cost, complexity and delay but which also threaten these process values.

It should also be noted that user satisfaction with alternative dispute resolution mechanisms also appears to be closely related to whether the participants view the process as careful, fair and impartial. One conclusion that can be drawn from this is that regardless of the particular decision-making forum, the public does not appear to want "quick and dirty" justice.

(vi) Interest Group Consultations

The Fundamental Issues Group of the Civil Justice Review undertook public consultations in an attempt to elicit a range of views from a variety of different "users" (or potential users) of the civil justice system. Consultations were carried out with a number of different interest groups, including business groups and groups representing disadvantaged persons: i.e. racial minority communities, disabled persons, the poor and women.

All of these groups identified some areas where the civil justice system did not appear to be working well. Technological changes, some kinds of procedural reforms and the provision of (voluntary) alternative dispute resolution mechanisms for some kinds of cases were all suggested as potential remedies to the problems of cost, complexity and delay.

However, there was scepticism and concern about the adoption of any "across the board" reforms which would limit access to the courts by driving certain kinds of disputes to alternative fora (e.g. administrative tribunals or mandatory alternative dispute resolution processes.) This was seen by disadvantaged groups as likely to result in "second class justice" for the poor, women and minorities (drawing in part on experience with human rights tribunals) and by business groups as the denial of a constitutional right to have civil disputes settled through an impartial decision-maker provided by the state.

All groups perceived the procedural rigour and precedent-setting powers of the courts as unique strengths. However, groups representing the poor, women, disabled persons and racial minorities expressed some concerns that the courts did not always take seriously the legal problems of the poor (e.g. landlord-tenant cases) and that judges were not always impartial in their treatment of racial minorities, disabled persons or women.

All groups used a number of different strategies to deal with legal problems. Resort to the formal legal system was only one option used for resolving problems. For business, the small amount of a claim, or the maintenance of good customer relations and other business relationships might well argue in favour of informal dispute resolution and against formal legal proceedings. For other groups, however, legal proceedings were simply not a real option in many cases because clients could not afford to bring legal actions. Either solution had to be found through alternative means or clients had to accept without redress the consequences of legal wrongs committed against them. Lawyers for disadvantaged groups indicated that they attempted to make best use of scarce litigation resources by bringing “test cases” to address legal problems being experienced by a substantial number of clients.

It should be noted that there were substantial variations in approaches to legal problems on the basis of a number of different variables: e.g. small business had different concerns from big business, lawyers representing low income people in rural areas had different views from those in urban areas.

To a large extent, the views expressed during these consultations were consistent with the results of public surveys and other studies of public perceptions of the civil justice system. Public views and use of the system appear to be highly varied and dependent on a wide range of social, economic and cultural factors.

In addition, these consultations suggest that any attempt to make fundamental reforms to the civil justice system is likely to raise some contentious issues. Though there may be a consensus that the civil justice system is too slow, too complex and too costly, it is difficult to identify any public consensus about what kinds of fundamental reforms should be made to reduce the volume of civil cases or the costs of ensuring the fair and impartial adjudication of disputes.

2. THE LANDSCAPE OF CIVIL DISPUTING IN ONTARIO: WHAT DO WE KNOW?

- (a) JOHN TWOHIG, CARL BAAR, ANNA MEYERS AND ANNE MARIE PREDKO, “EMPIRICAL ANALYSES OF CIVIL CASES COMMENCED AND CASES TRIED IN TORONTO 1973-1994”**

- (i) Patterns of Civil Disputing in the Courts 1973-1994**

The Ministry of the Attorney General has maintained statistics about the courts since 1973. The variety and amount of information collected has increased over the years but the information collected never seems to match the expectations of those who wish to know more about the justice system. An examination was undertaken to review the statistics collected in the period 1973-1994. This review was supplemented by a more detailed review of actual court files to obtain as much information as possible about the nature of disputes brought before Ontario’s courts. The purpose of the review was to confirm or deny some basic assumptions about civil disputing in the courts.

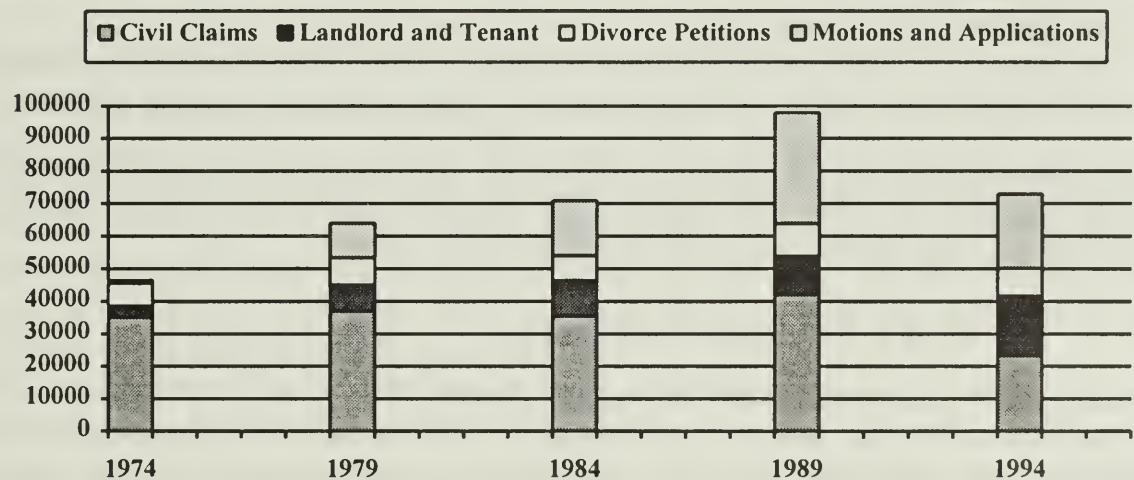
Statutory and procedural changes are presumed to have influenced the type and pace of litigation in the courts. The exact nature of these influences could not always be accurately measured and would require separate studies for more exacting numbers. Notwithstanding this shortcoming, the effects of statutory, procedural and other changes could be seen reflected in

civil litigation. The following represent some of the chief patterns observed over the twenty year period examined:

- Civil causes of action commenced by statement of claim are proportionally less of the court's filings in 1994 than in 1974.
- Landlord and tenant applications, motions and other applications are proportionally more of the court's civil filings in 1994 than they were in 1974.
- In 1994 civil filings reached a twenty year low, after a twenty year high in 1992. The introduction of no fault auto insurance had the most profound effect on civil disputing in the twenty year period observed.
- The number of divorce petitions, criminal trials and summary conviction appeals appears to have little influence on the volume of work in the Ontario Court (General Division).
- Total dispositions are decreasing, but when divorce dispositions are factored out, trials of civil claims which arise from a cause of action are increasing.

These observations require explanation. The figure below reproduced from the Empirical Research Paper¹ demonstrate the caseload makeup as well as the volume of civil cases filed in Ontario between 1973 and 1994.

Figure 3.2 Breakdown of Total Civil Filings by Type of Claim



For Fiscal Year Ending March 31

The figure reveals that applications and landlord and tenant matters have become a larger segment of civil disputing. These changes may well be the result of major procedural reform in 1985 and statutory reform, which encouraged the use of applications as the preferred method of commencing civil matters. The dramatic increase in civil disputes filed in 1989(which continued until 1992), paralleled economic growth in the late eighties followed by a recession and the elimination of most auto accident disputes from the courts in 1990.

Figure 4.2 also reveals that the number of divorces filed has remained relatively constant over the years. A similar observation applies to the number of summary conviction appeals.

¹ Ibid.

The number of criminal trials actually decreased in the period. This observation could be very misleading, since it is almost certain that the length of criminal trials has increased dramatically. This is an example of an area where more research is required about the length of criminal trials. The amount of resources devoted to criminal law matters, of course, has a direct influence on the civil justice system.

The last observation concerning dispositions by a judge at trial and the growth of the pending list for trials is a finding that may have many diverse explanations.

(ii) Civil Court Environment

Court statistics cannot be viewed in isolation from other factors. Some of the factors which influenced the pattern of civil disputing in this period are listed below:

- The number of lawyers, judges and courtroom facilities increased over the twenty year period.
- The volume of paper stored in civil files increased dramatically, possibly as a result of increased use of document production and information technology.
- The population of Toronto, Ontario and Canada grew, and there was an increase in population density in the major urban areas.
- The economy experienced periods of expansion and recession in the twenty year period observed and it is assumed that economic change has a direct impact on the civil justice system. In 1994, the Ontario and Toronto economies were not as strong as they were in 1974 and 1984.
- In the period considered, legal aid funding of civil matters increased, but funding for civil litigation, excluding family matters, is a small proportion of legal aid dollars.

These observations must be borne in mind when reviewing court statistics because they suggest the manner in which civil litigation has changed—more paper, more lawyers and periods when the economy encourages and discourages litigation.

(iii) What is the Typical Civil Case?

Court statistics do not record the wide variety of cases filed or tried, and there is no record kept of the time required to process cases through the court system. The research reflected in the Empirical Research Paper developed a profile of cases filed and tried. The results are summarized here and under the next section.

Collection cases form the largest category of cases commenced (37.4%) but the proportion which proceed to trial drops dramatically (18%). This is no doubt because many of these files result in default judgements or settlements.

Negligence cases form a greater portion of the trials surveyed (48%) than their representation in cases commenced (29.3%). Contract/commercial cases are those matters that cannot simply be categorized as simple collection cases. These cases increase in the trial sample, from 16.4 % of cases filed to 21.1% of cases tried. This increase is not as sharp as that seen with negligence cases. Property cases drop as a proportion of the trial sample from 16.9% of cases filed to 13% of cases at trial.

In the survey of cases commenced, negligence cases (excluding motor vehicle) and property cases increased in 1993/94. Motor vehicle case showed a dramatic decline. This may

suggest that negligence lawyers have begun to fill the void left by no fault auto insurance and a downturn in the economy has increased property disputes.

The frequency of pleadings with a statutory basis in the cases commenced has increased in the 20 year period. This increase did not reflect as much a real increase in novel litigation as it did a change in the way cases are pleaded. The percentage of cases with a statutory basis in the pleading was only 13.8% in all cases commenced and 16.9% of cases which went to trial.

The 20 year average of monetary claims for cases which went to trial was \$255,520 and \$250,734 for all cases commenced. The respective median claims were \$15,883 and \$9,654. This supports the assumption that claims which have more money in dispute are more likely to take longer and to go to trial.

It may be important to bear in mind the number of litigants in each case as well as the type of litigant. These factors together with the type of case may be significant factors in predicting a number of things such as: likelihood of trial, number of motions, length of trial, time in the system and possibility of settlement.

The review of cases commenced revealed that 84.3% of cases had one plaintiff, 10.9% had two. In cases which went to trial the results were 78.4%—1 plaintiff and 15.8%-2 plaintiffs.

In cases which went to trial and in the general population of cases commenced, 55% of cases had one defendant and 30% had two defendants. With the exception of 1988/89, the multiplicity of litigants, whether as plaintiffs or defendants, did not vary over the 20 year period.

Seventy to 80% of plaintiffs are banks, corporations and institutions. Over 50% of defendants are individuals. In cases commenced, 68.5% were based on a business relationship and 24.5% were personal. In cases that go to trial, personal relationship cases rose to 38.6% with a 20 year high in 1973/74 of 62.3%. These figures are consistent with the increase in negligence matters which go to trial. This suggests that the assessment of damages and the personal involvement of litigants with the issues at hand play a significant role in predicting whether a case will go to trial. These findings are important in suggesting ways in which new economies should be introduced in the court system. Since trial time is the most expensive resource in the system, those cases which are more likely to go to trial should be targeted in any effort to streamline the civil justice system.

The length of relationship of the parties may predict the likelihood of a case going to trial. One time relationships were more likely to result in a trial than those of 6 months or more duration. Long term relationship cases were more likely to be business cases as opposed to negligence or personal cases that are the result of a one time relationship e.g. an accident.

(iv) What Happens to the Typical Civil Case?

The defence rate in the 20 year period is approximately 35%. Or put another way, 65% of all cases filed were never defended. Since 28.3% of cases led to a default judgement, this means that in 36.7% of all cases filed with the court no further involvement by the court with the case. These cases may be settled by the parties or abandoned and the court is usually not notified. The defence rate has risen in the 20 year period from a low of 24.7% to a high of approximately 40%.

As discussed earlier, the multiplicity of parties can sometimes predict the time and resources required to dispose of a case from the system. In 5.4% of cases commenced there were 2 or more defences, while 12% of cases which went to trial had 2 or more filed

defences. The number of separately represented defendants appears to be an indicator that a trial may occur.

The percentage of damage assessments (undefended trials) has steadily declined between 1973 and 1994. This may in part be explained by the introduction of no fault auto insurance.

Motions occur in 50% of cases. In 1973/74, 10% of cases that went to trial had 5 or more motions. This increased to 41.4% in 1988/89 and dropped to 23.4% in 1993/94. The percentage of trial cases which had at least 1 motion increased from 69.6% to 94.3% in the twenty year period.

Motion activity in the general population of cases commenced survey did not increase over time. The occurrence and multiplicity of motions appear to reflect the likelihood of trial.

Another factor examined involved the complexity of pleadings as measured by the presence of crossclaims, counterclaims or third party claims. Our review suggests that a case with a counterclaim, crossclaim or third party action is more likely to be longer and to result in a trial.

In the review of cases commenced, 31.8% contained no disposition, 10.3% were discontinued, 21.6% were settled, 3.7% were dismissed, 28.3% had a default judgment, 3.5% went to trial and 0.8% had a partial trial. The trial rate finding has been replicated in other studies both in and outside Ontario.

The outcome of trials is another area where very little is known. Our empirical analyses suggests that 65.9% of cases that resulted in a trial contained an order for the plaintiff, 16.4% were dismissed and the balance of 17.7% were settled. This does not mean that the plaintiff was entirely successful, but it does reveal a significant success rate in favour of plaintiffs.

The pace of litigation continually slowed over the 20 year period, whether a case went to trial or not. This finding appears to be consistent with other findings in our review which suggests that litigation is more paper intensive, involves more motions and pleadings and is no doubt more expensive. The median time for disposition of a case that did not involve a trial in 1974 was 139 days. This rose to 334 by 1989. For cases requiring a trial the median was 547 days in 1974 and 1088 days in 1994.

Generally speaking, cases involving business relationship cases are faster if a trial is not involved. This finding encompasses all of the default judgements which banks and businesses obtain. Relationship does not seem to have affected the pace of litigation when a case proceeds to trial.

The median time to disposition for jury trials is somewhat slower than non-jury trials but the 90th percentile of jury trials are faster than non-jury cases.

(v) Civil Litigation in Other Jurisdictions

Unlike Canada, annual statistical information is available on a county wide basis for the U.S. state and federal courts. In the U.S., there has been a decline in tort litigation at the state level. Domestic relations cases continue to rise. Overall, there has been a 21% rise in civil filings at the state court level between 1985 and 1992. This parallels the rise seen in Ontario.

As in Ontario, property rights cases rose in the U.S. state courts between 1985 and 1991 before dipping slightly in 1992. The rate of civil filings in the U.S. federal courts has been relatively stable in the last decade.

Ontarians file fewer lawsuits than Americans on a per capita basis. In 1992 Ontario had 3,735 lawsuits filed per 100,000 of the population. This filing rate, which represented a twenty

year high for Ontario, would rank the province ahead of only of Tennessee and Nevada in the United States. U.S. state courts have more judges per capita than Ontario courts.

Based on per capita filings rates, the English are more litigious than Ontarians.

The pace of litigation in England and Australia approximates that of Ontario. The trial rate in Australia varies between 3 and 8%. The defence rate is higher than in Ontario – approximately 43 to 53%.

(vi) Civil Justice Statistical Information in Ontario

The current statistical information system in Ontario does not provide a detailed breakdown of case types. The information is gathered manually and in aggregate form and is not available in a timely or public format. The information obtained is not always compatible with other statistics gathered in the justice system. Those working within courts administration are aware of these shortcomings and are anxious to correct this situation.

Dr. Barry Mahoney² suggests that, at a minimum, court statistical information or management information should reflect the following:

- (1) size of the pending case load, perhaps divided by relevant case categories (ideally, this case load would reflect a target figure set as the goal for a back log elimination program and ongoing disposal rates)
- (2) age of the pending case load, correlated with timeframes established by the rules (e.g. no standard track case pending more than x months; no family law case pending more than y months)
- (3) trial scheduling effectiveness (e.g. at least 75% of cases set for trial begin trial on the scheduled date; no more than 20% of cases scheduled for trial “collapse” because of a settlement or an adjournment less than three days before the trial; no more than 5% of cases scheduled for trial are adjourned because no judge is available)
- (4) age of cases at disposition (which, after elimination of the backlog, should correlate with and, optimally, be substantially less than the maximum time period set for completion of cases on specific tracks).

Future data collection systems should be automated and should collect micro level information automatically. Management statistics should be available in a timely fashion. However, there is a danger in all of this. The court system may be efficiently managing a justice system that the public does not wish or expect. There must be some way to link public expectations of the civil justice system to what is actually going on within the system. Therefore, ongoing information about public expectations must somehow be correlated with statistical information.

The way of the future must involve increased use of technology. Money should be invested in operational systems which, among other things, would produce good statistical information. Systems are not built solely for the purpose of statistical collection. To implement the appropriate operational technology, all of the groups that require information should be represented on “a user requirements group”. Such a group would coordinate a determination of all informational needs from an automated court system. The determination of information

² Mahoney, Barry. “Review and Recommendations concerning Case Management Pilot Projects in the province of Ontario” (November, 1992).

needs and the coordination of and building of an operational system that meets those needs, is the key to satisfying the demand for more statistical information.

In the future, statistics should be easy to collect, consistent across the province and easy to modify and adapt for use by different audiences. Ownership of the statistical information system should belong to those who developed the requirements and who will modify those requirements over time.

(b) LARRY FOX, "ADMINISTRATIVE AGENCIES EMPIRICAL STUDY"

(i) Importance of Context

Each year hundreds of thousands of decisions are made by "administrative decision-makers" in Ontario. Decisions are made by individuals, as well as boards, commissions and tribunals.

The "universe" of administrative decision-makers is very diverse. Some handle disputes between private parties. Many decide disputes between the government and individuals. Certain disputes are narrow. Others involve complex, essentially policy decisions, involving public participation in the hearing process and reliance on expert evidence.³ Many decision-makers operate within relatively narrow regulatory contexts, making decisions *directly* affecting only those whose conduct is regulated. Schemes that require licensing or registration or involve agricultural marketing are of this nature. Other decision-makers operate within legislative schemes that apply generally.⁴ Finally, certain decision-makers administer benefit, compensation or insurance schemes⁵.

Many administrative decision-makers simply hold hearings in order to make decisions. They may address a relatively narrow issue or conduct a broad-ranging inquiry. Examples of the former include bodies that hold appeals or reviews of (1) proposals to deny or cancel benefits⁶, (2) proposals to deny or cancel a licence or registration needed to carry on a commercial activity⁷ (3) government orders that enforce prescribed standards.⁸ Generally,

³ Examples of broadly participatory hearings include assessment hearings held by the Environmental Assessment Board, rate hearings held by the Ontario Energy Board, and Ontario Municipal Board hearings on official plans.

⁴ For example, the *Occupational Health and Safety Act* and the *Employment Standards Act* apply to all employers (save for those under federal jurisdiction). The *Building Code Act* and the *Rent Control Act, 1992* apply generally to building standards and rents, respectively.

⁵ For example, the Workers' Compensation Board, Criminal Injuries Compensation Board, Ontario Insurance Commission, and the Ministry of Community and Social Services in its administration of the Family Benefits Act.

⁶ For example, Social Assistance Review Board, Ontario Student Assistance Program Appeal Board, Health Services Appeal Board.

⁷ For example, Commercial Registration Appeal Board, Farm Products Appeal Tribunal, Health Facilities Appeal Board.

⁸ For example, Environmental Appeal Board, Fire Code Commission, and the Office of Adjudication, which hears appeals under the Employment Standards Act and the Occupational Health and Safety Act. While most tribunals with an appeal function hear appeals or reviews relating to decisions or proposals of provincial officials, some deal with decisions made by municipal officials. For example, the Social Assistance Review Board hears appeals under the General Welfare Assistance Act from municipal decisions.

these decision-makers do not gather information on their own, but depend on the parties to present evidence in the hearing.

Other bodies—the Ontario Energy Board, the Environmental Assessment Board—hold hearings on wider issues.⁹

While many bodies function only by holding hearings,¹⁰ others have several functions, of which the conduct of hearings is but one. Some of them are responsible for “comprehensive regulation” in an area: this may involve standard-setting, explicit policy-making, licensing and discipline of those it regulates, investigations, “quasi-criminal” prosecutions, and holding administrative hearings. The Ontario Securities Commission, the Liquor Licence Board of Ontario, the Ontario Insurance Commission, and the Pension Commission of Ontario fall into this category. In the case of each of them, adjudication is a minor part of many important regulatory activities.¹¹

Labour relations tribunals also perform several functions, in addition to adjudication. The Ontario Labour Relations Board certifies unions, appoints mediators and, for the construction industry, hears grievances. In addition to holding hearings, the WCB, WCAT and the Criminal Injuries Compensation Board also engage in investigative activities. Both the College Relations Commission¹² and the Education Relations Commission¹³ perform several functions, including monitoring negotiations, training third-party neutrals and collecting and disseminating statistical information. The Grievance Settlement Board adjudicates public sector disputes and provides mediation services.

(ii) Caseload

There is a great range in caseload among Ontario’s administrative bodies. While a number receive relatively few new cases each year, others have enormous caseloads. In 1994, the Workers’ Compensation Board (WCB) received approximately 375,000 claims, which initially are determined administratively, without any form of oral hearing, and then are subject to a multi-level internal review process. The Assessment Review Board (ARB) received approximately 300,000 new cases in 1993, and 190,000 new cases in 1994.

In between the extremes, there are wide variations. A number of boards receive over 2,000 new cases per year. Of these, the Social Assistance Review Board (SARB) seems to have the highest volume, receiving more than 11,000 new cases in 1994-95. Other administrative bodies have caseloads that are measured by hundreds.

⁹ The Ontario Municipal Board has jurisdiction to hold hearings under more than 150 statutes, and deals with both narrow and broad issues. It also exercises an appellate jurisdiction in relation to decisions of the Assessment Review Board.

¹⁰ Bodies that have created solely for the purpose of holding hearings may, of course, adopt measures that will facilitate resolution of the issues or settle the dispute altogether, avoiding a hearing.

¹¹ We are here referring to the Ontario Insurance Commission in its capacity as “regulator” of the insurance industry, and not to its role in dispute resolution of statutory accident benefits.

¹² Under the Colleges Collective Bargaining Act, the CRC is responsible for labour relations relating to community colleges.

¹³ Under the School Boards and Teachers Collective Negotiations Act, the ERC is responsible for labour relations between school boards and teachers.

It is important to consider these data with an appreciation of contextual factors. Conclusions should not be hastily drawn about “workload”. Data about incoming caseload must be seen in light of the specific mandates of each decision-maker, the nature and complexity of its issues, the context in which it functions, and its resources. For example, we have already noted that, for certain regulatory commissions—the OSC, OIC and PCO—hearings play a very small role in discharging their mandates.

The example of the Environmental Assessment Board well illustrates the need to be cautious in interpreting incoming caseload data. The EAB received 18 new applications in 1993 and 11 in 1994. In terms simply of “new cases”, these numbers are dwarfed by the volume of cases filed with other decision-makers. However, some environmental assessment hearings are very complex and lengthy, and involve difficult issues, the participation of several intervenors, and voluminous technical and scientific evidence. Hearings may require months—or even years—of hearing time, with lengthy adjournments to allow the parties to prepare their cases.

The caseload of decision-makers that conduct appeals or reviews of decisions made or proposed by “lower level” authorities is directly affected by changes below, whether in the substantive criteria governing decisions or in the extent of enforcement or other activity.

For example, SARB’s caseload increased each year during the past five years. While, in part, this reflected the recession, other factors were also important. Regulation changes under the *General Welfare Assistance Act* and the *Family Benefits Act* reduced payment rates for sponsored immigrants. Administrative officials adopted enhanced verification procedures, involving more frequent monitoring, for permanently unemployable and disabled cases.

It should also be appreciated that, to the extent that a Ministry or other authority imposes a greater number of administrative sanctions—for example, a proposal to revoke a licence—it may increase the caseload of the tribunal that hears appeals from sanctions.

(iii) Duration of the Process

The same factors that urge caution in dealing with “caseload data” apply to data on the length of time that it takes a case to “travel” through a decision-maker’s process. In the case of some tribunals, it generally takes less than three months for an application to be filed, heard and decided, with reasons issued to the parties.¹⁴ For others, the usual period is 3-6 months.¹⁵ The process of a number of administrative decision-makers takes longer than six months from beginning to the delivery of a decision.¹⁶ Indeed, for some, the entire process may take over a year.

¹⁴ For example, Ontario Labour Relations Board, Farm Products Appeal Tribunal, Farm Products Marketing Commission, Crop Insurance Arbitration Board, Building Code Commission, Ontario Racing Commission, Ontario Farm Implements Board, Fire Code Commission, Insurance Commissioner, Insurance Superintendent, Education Relations Commission.

¹⁵ For example, Commercial Registration Appeal Tribunal (3-6 months), Ontario Drainage Tribunal (4 months), Ontario Highway Transport Board (16 weeks), Liquor Licence Board of Ontario (average 185 days, but varies with the issue).

¹⁶ For example, Assessment Review Board (assessment complaints), Mining and Lands Commissioner (average 6 months, but some take more than 1 year to resolve), Ontario Energy Board (average 8.5 months in rate cases), Office of Adjudication (range 6 to 9 months).

The duration of the overall process is affected by the mandates of the decision-makers and the nature of their issues. It may also be relevant whether the parties are represented. In addition, certain bodies—such as the Ontario Human Rights Commission, the Criminal Injuries Compensation Board, WCB and WCAT—engage in investigative activities, which prolong the overall process. Medical disability issues, of the kind considered by the Dispute Resolution Group of the Ontario Insurance Commission, WCB and WCAT, not only require expert medical evidence, but may require time to determine whether a medical condition exists. Proceedings before the Environmental Appeal Board and the Environmental Assessment Board may involve lengthy pauses, during which the parties prepare their cases, conduct scientific or other studies or negotiate. This may lead to a longer time period before the hearing commences or, in the case of the Environmental Assessment Board, lengthy adjournments, but may shorten the actual hearing.

Hearings also vary greatly in length. While a hearing about an official plan may take one year before the Ontario Municipal Board (OMB) or more than one year, other hearings may take an hour or less.

It is important to emphasize that not only do the length of the process and the duration of the hearing vary among the various administrative decision-makers, but, in some cases, they vary with the type of issue decided by a decision-maker. Many matters decided by the OMB take less than one day to hear. In the case of the ARB, contested municipal tax applications take two months from the receipt of the application to issuance of the decision. However, assessment complaints take seven months, with more complex complaints requiring more time to conclude. The processing times for matters heard by the Ontario Labour Relations Board vary with the type of case.

(iv) Data Collection

There is a great range in information collected by administrative decision-makers. Some compile detailed data about caseloads, dispositions, and the time that it takes to “process” a matter. Others keep basic information about caseloads and dispositions, but do not “track” processing time.

Ontario decision-makers vary greatly in their annual budgets, staff complements, and financial and other resources. Some have sophisticated computer systems, while others rely on manual records. Even those that have computer systems likely have designed them to serve their own case management and other goals, and to generate information to serve their own particular needs. A number of boards, commissions and tribunals have part-time members only or a combination of full-time and part-time members. Finally, the processes of the decision-makers are not uniform. While many simply hold hearings, others have more complex processes involving investigations or levels of decision-making.

It would be very desirable to develop a strategy for gathering useful statistical data, which could inform future policy work about particular decision-makers and the administrative justice system. In light of the factors identified above—and, in particular, the disparity in resources among administrative decision-makers—it is desirable that this strategy evolve out of a consultative process that would involve representative decision-makers and interested government ministries, in particular, Management Board of Cabinet.

3. THE CHOICE OF GOVERNING INSTRUMENTS: DEFINING AN APPROPRIATE DOMAIN FOR CIVIL CLAIMS

R. HOWSE AND M. TREBILCOCK, "THE ROLE OF THE CIVIL JUSTICE AND THE CHOICE OF GOVERNING INSTRUMENT"

The paper by Professors Robert Howse and Michael Trebilcock, "The Role of the Civil Justice System and the Choice of Governing Instrument" emphasizes that in most contexts the advancement of civil claims in the courts is merely one of a number of possible policy instruments that might be deployed to vindicate a particular social value or policy objective. In order to place adjudication in the broader context of the legal system, the authors argue that it is necessary to review the potential range of objectives or rationales served by the legal system at large.

The authors briefly review the possible rationales for legal ordering. These rationales are grouped into four categories—economic efficiency, distributive justice, autonomy and corrective justice, and communitarianism. Economic rationales include (1) facilitating exchanges through the reduction of the transaction costs of bargaining, (2) interpretation and rule application which further serve to reduce transaction costs, (3) enforcement of non-simultaneous changes, although the authors note that state enforcement may not be the only or most important means of inducing compliance with bargains compared to other sanctions such as reputation effects, including credit standing; (4) correcting for marketing failures, which include (a) imperfect information, (b) negative and positive externalities, where bargaining amongst all affected parties may be unable to internalize the externalities due to transaction costs and strategic behaviour, (c) public goods such as highways and education, which are unlikely to be optimally provided through purely private markets, (d) monopoly power which may result in inefficiencies, distributional concerns, and concerns about autonomy to the extent that monopoly entails coercion; (e) irrational or self-destructive behaviour where individuals might reasonably be thought not to be acting on their own true preferences and paternalistic interventions may be warranted on that account.

Distributive justice rationales for legal ordering encompass a variety of claims about the appropriate distribution of resources in society where it is widely argued that there is a range of morally arbitrary circumstances that should not determine the welfare or life chances of individual members of society. While there has been a tendency to attribute redistributive purposes to a wide range of laws and institutions in society, in fact the bi-polar nature of the civil justice system in general is not well suited to the achievement of a broader vision of social equality.

Autonomy and corrective justice rationales for legal ordering view the essential function of the state as providing for (facilitating) the co-existence of the freedom of each with the freedom of all through laws that prevent interference by individuals with the rights of other individuals to property and bodily integrity. On this view, breach of contract or tortious injury constitutes interference by one individual with the rights of another. This is perhaps the core rationale for the civil enforcement of individual claims in the courts. However, a more expansive view of autonomy may justify a range of other state policies designed to enhance individual opportunities for self-development and the right to be recognized as an equal in the sphere of civil society.

Finally, communitarian values view community as an end in itself, not merely as a vehicle for the realization of the shared aims and goals of individuals, Communitarians are thus likely

to prefer forms of state intervention that do not entail the parcelling out of individual entitlements or rights to be vindicated in adversarial settings. Where wrongful behaviour has occurred, the communitarian focus will more likely be on “healing” or social reintegration rather on punishment or correction.

The authors then go on to point out that with respect to each of these rationales, a range of policy instruments is available that, depending on the context, may be appropriate forms of vindicating the values in question. For example, with respect to the facilitation of market transactions, the state may develop a set of norms as default rules, leaving the parties free to opt out of these norms and substitute their own. Similarly, while some parties may wish to submit disputes to civil adjudication, others may instead prefer to submit disputes to private arbitration. In order that parties make efficient choices between private and state provided norms, arbitration, and enforcement, it is important as a general principle that they be charged the full costs of state provision, except where there is an important public goods aspect to state adjudication (e.g. the creation of major precedents that may guide the behaviour of future parties) or impecuniosity which may engage distributive justice concerns. With respect to imperfect information, alternatives to private law doctrines enforceable in the courts is regulation that requires information to be disclosed or is directly provided by the state. In instances where informed individual judgment about risks is very costly, there may be a justification for prohibiting certain kinds of transactions or activities altogether. With respect to externalities, private rights of action might complement and supplement public enforcement of regulation. Similarly, whistle-blower laws that allow for insiders such as employees to collect a bounty when they make available to the authorities information on wrongdoing within their organization may complement public enforcement efforts.

With respect to distributive justice rationales for legal ordering, where other rationales such as autonomy or corrective justice justify resort to the civil justice system it may be appropriate to take positive measures to increase the access of the disadvantaged to the system. However, in general distributive justice considerations may point to a choice of instruments that minimize reliance on the civil justice system, for example, compensation schemes for accidents, rather than tort liability. However, even here, it may be desirable to maintain a residual private right of action in tort law in extreme cases as an option available to an injured party for corrective justice, deterrence and public accountability reasons. With respect to the autonomy and corrective justice rationale for legal ordering, the authors note that while this provides the central rationale for much of the civil justice system, it does not necessarily require that claims based on corrective justice considerations be vindicated only in courts, and leaves open to question as to whether other institutions, such as administrative agencies, can, in a particular context, better vindicate such claims.

With respect to communitarian rationales for legal ordering, while the existing civil justice system is often pejoratively characterized by communitarians as adversarial, implying that the justice system itself is responsible for creating the differences of interest or perspective that exist between the parties, “natural” communities often resolve conflicts by authoritative hierarchy, violence, the threat of violence, or emotional blackmail. This being said, there is a legitimate communitarian rationale for structuring regulation or taking other measures so as to avoid disputes or conflicts arising in the first place where this is feasible.

In the light of these general considerations bearing on instrument choice, the authors proceed to undertake five brief case studies relating to (a) medical misadventure; (b)

construction liens; (c) landlord and tenant disputes, (d) the employment relationship, and (e) the Ontario Human Rights Code and Commission.

With respect to medical misadventure, the authors conclude that a well-designed administrative no-fault compensation scheme is likely to achieve distributive justice objectives much more effectively than the tort system. Corrective justice values can still be vindicated to some extent by preserving tort claims in cases of egregious wrong-doing causing serious injury. Preservation of tort entitlements in a limited set of cases, combined with extensive risk or experience rating of no-fault compensation premia or levies, may best advance corrective justice, deterrence, and public accountability values. In addition, regulatory reforms to medical licensure and accreditation regimes need to be assigned a higher priority if a less central quality control role is to be assigned to the tort system.

With respect to construction lien litigation, the authors conclude that the problem of excessive demands on the civil justice system is readily amenable to resolution through a combination of fully allocated social costing of publicly provided dispute resolution services in this area, delegation to specialized publicly appointed arbitrators (Masters), and full institutional competition between public and private dispute resolution systems.

With respect to landlord and tenant disputes, which have increased dramatically in recent years, the authors conclude that to date there has been little systematic empirical analysis of why there is increased disputing. For example, if increased disputing is a function of difficult economic times that lead to tenants being unable to sustain their obligations to pay agreed-upon rent, moving the process from the courts to an administrative agency (as many have advocated) will do little to address the underlying problem and indeed may remove important protections for tenants against the potentially serious contingency of losing housing. Much more likely to have a positive effect would be an amendment to landlord and tenant legislation to permit binding settlements with respect to rent arrears where landlords are able to accommodate tenants' temporary economic difficulties, or some kind of rent insurance scheme, particularly for low or medium-income tenants.

With respect to the case study on the employment relationship, the authors focus first on workplace injuries. Here, while an administrative compensation scheme, such as Workers Compensation, is clearly a superior instrument for advancing distributive justice values relative to the tort system, if not properly designed it may undermine deterrence considerations as well as corrective justice values. While this may suggest the importance of risk and experience rating in Workers' Compensation premia, designing these features of the scheme so as to avoid undesirable second order incentive effects, such as dismissal or failure to hire workers who are particularly vulnerable to injury, raises significant complexities in instrument design. The experience of Joint Health and Safety Committees in workplace accident contexts suggests that in some contexts internal governance mechanisms may be an effective means of vindicating deterrence or compliance concerns, while also serving communitarian values that support the reinforcement of long-term relationships. With respect to non-workplace accident concerns of the kind dealt with under the *Employment Standards Act*, the effective bureaucratic processing of large numbers of claims under this Act e.g. for unpaid wages, vacation pay etc., while not foreclosing access to the courts, suggests that administrative resolution of claims should not necessarily be considered as a disjunctive choice between the courts and administrative agencies.

With respect to the human rights case study, the authors conclude that the record of the Ontario Human Rights Commission suggests that it is naive to identify administrative processes

as having intrinsic properties that obviate some of the most evident drawbacks in the civil litigation process, such as delay and complexity in decision-making and disempowerment of those who are relatively disadvantaged. The Ontario Human Rights Commission's experience dramatically illustrates the thesis of this study that failure to disaggregate policy goals and the instruments and institutions that can best serve these multiple goals in a particular context is likely to lead to regulatory incoherence and failure. In the human rights context, the authors conclude that there are strong reasons for allowing complainants access to the courts as an alternative to pursuing claims before the Ontario Human Rights Commission and that internal governance structures analogous to Joint Health and Safety Committees, as well as contracting out of educational functions to community or other non-governmental organization and groups, may better vindicate the values reflected in anti-discrimination laws than preserving a monopoly on all these functions in a public administrative agency.

The authors conclude their study by emphasizing the importance of asking the right questions with respect to any proposed involvement by the state in economic and social activities in response to a perception of a problem. They argue that there are four core or basic tranches of questions that should be posed. These relate, in sequence, to: (a) the choice of policy objectives, (2) the choice of policy instruments, (c) the choice of administrative or institutional forum, (d) the choice of decision-making processes within the chosen forum. The nature of the choices that are required at each stage in this sequence are sketched out in an appendix to the study.

4. THE ALLOCATION OF CIVIL DISPUTING FORUM

Assuming that the analysis undertaken of a particular problem area pursuant to the analytical framework proposed in Section III yields a conclusion that the values or interests at stake can only be fully vindicated through the availability of a civil claim, either alone or in combination with other policy responses to the problem, the next fundamental issue to be addressed is in what institutional forum should these claims be pursued? The principal research papers commissioned on the set of issues raised by this question were authored by Lorraine Weinrib, "The Role of the Courts in the Resolution of Civil Disputes" and Martha Jackman, "The Reallocation of Dispute from Courts to Administrative Agencies". Professor Weinrib's normative orientation predisposes her to courts, while Professor Jackman's predisposes her to administrative agencies.

(a) LORRAINE EISENSTAT WEINRIB, "THE ROLE OF THE COURTS IN THE RESOLUTION OF CIVIL DISPUTES"

This paper discusses the normative role of courts in resolving civil disputes in Ontario. It considers various attitudes to court adjudication in a period of increased interest in alternative dispute resolution; the constitutionally mandated role of courts under the Canadian Constitution; and the institutional strengths of courts in delivering civil justice to the residents of Ontario. In the light of these considerations, it considers, as case studies, the desirability of the blanket exclusion in Ontario of Workers' Compensation and Human Rights claims from the courts.

In taking up these questions, the author focuses on the justice side of the access to justice equation. Her concern is not the who, how, or when of justice, but the what; what is our understanding of justice within and beyond the legal system? What is justice in the context of a

civil dispute? The author thus engages the issue of “values”, rather than categories of disputes or empirical data where claims about what forms of adjudication are best suited to what category of dispute are subject to serious indeterminacies with respect to classification systems, empirical evidence, and relative efficacy.

The author notes that the precipitating factor for the Civil Justice Review is perceived court overload in Ontario with attendant costs to both the public and private purse, and inordinate delay. However, she argues that there are different ways of viewing this problem. One approach is to formulate policies for diverting a significant part of the existing case load from the courts into alternative dispute resolution mechanisms on the assumption that they will offer less expensive, faster, and less formal means of dispute resolution. Others read the indicia of court overload differently, acknowledging the unique social and legal role of courts as institutions for vindicating rights. On this view, the problem of overload precipitates effort to maximize and equalize enjoyment of the unique features of court deliberation and adjudication. On this view, courts do more than resolve altercations: they set the rules of interpretation, provide authoritative interpretation of private documents and enactments of legislatures, develop the common law in both established and new areas of public and private concern, articulate the written and unwritten constitutional norms of the polity, and assure the rule of law. For the vast number of cases that do not reach the courtroom, resolution of these cases still occurs in the shadow of legal rules enunciated by the courts.

The growth of interest in access to justice, from a comparative perspective, has been traced to three sequenced waves. The first wave had as its focus the provision of state funding to equalize access to the courts for those unable to pay through state payment to private lawyers or the provision of state-paid salaried lawyers. This approach enlarged opportunity to resort to the courts but attracted criticisms because the financial help afforded was inadequate to meet the need; the system did not reach all possible rights claims; it depended on initiation by the disadvantaged who are less likely to have the knowledge or capacity to press claims; and it did not properly afford assistance for test cases for the development of new rights. Critics also attacked the basic premise of this approach which casts too many disputes in a legal adversarial mode with the result that it produces more formal than substantive change.

The second wave responded to these critiques by going beyond funding access by the poor to the existing primarily private law system and recognized the need to support litigation of public law issues affecting groups. This wave led to changes to court procedures including expansion of standing rules, the availability of class actions, and the provision of specialized administrative tribunals. Owen Fiss is perhaps the most prominent and articulate proponent of the second wave of access to justice movement, advocating the enlargement of the world of legal claims to include the public law entitlements of groups, particularly vulnerable minorities defined by personal characteristics such as ethnicity or race or disability or political powerlessness. He sees the judge as the neutral third party, able to lessen the impact of distributional inequalities and provide a conceptual and normative distance between the courtroom argument, which may not fully or adequately represent the group of interests engaged, and the ultimate result and reasons for judgment. The courts thus play a special role in vindicating important public values.

While the access goals of these initiatives may have had some success, the resources of courts were strained and their legitimacy in adjudicating many novel public law issues was called into question. The administrative tribunal process in turn often evolved in ways that replicated the

formalities, costs and delays of the court system, and in some cases proved vulnerable to capture by the interests that were intended to be regulated.

The third wave of access to justice has taken a yet wider approach in terms of institutions, issues, and constituencies and aims at more than equalizing access to legal services through legal aid, and broadening entitlement and process beyond the two party litigation of private law suits in the courts or deliberations of administrative tribunals. Instead it seeks to transform the “justice industry” by having it offer a far more variegated line of “products” in far greater quantity to a far greater variety of “markets” with a far greater consumption potential than previously appreciated. The point of this approach is not to accord appropriate process or substantive law for legal disputes, but to address conflict in society at large. On this view, alternatives forms of dispute resolution to formal court adjudication were intended to sustain the social nexus in which the dispute arose, to lead to consensus, to constrain future conduct, to achieve social stability and cooperation. The challenge for this third approach was to classify disputes and to hive off from the courts those cases that other institutions and processes would better oversee. This approach presupposed that the nature of disputes and the modes of deliberation were sufficiently stable to support a viable classification system. This idea of classification, and its projected economies, has been labelled, “the new formalism”.

The author notes that Lon Fuller’s work appears to be the starting point for this third approach but is not clear that he would have supported many of the implications that have been associated with it. He stressed that social order requires a rational court to preserve human institutions and it is adjudication that gives formal and institutional expression to the influence of reasoned argument in human affairs. Adjudication is a concentrated form of this exercise in reason. The reason engaged in is not at large; it is based on claims of right and accusations of guilt. Essential to the judge’s task as adjudicator is an effective adversary process, a process that presents intelligent and vigorous advocacy on both sides and promotes the impartiality of judgment. At the end of the task it is optimal for the adjudicator to provide reasoned decisions in order to assure the parties that the reasoned arguments and proofs presented on their behalf entered into the reasoning and also to serve as a guide to whatever continuing relationship that the parties may have. Fuller argued that problems that have significant and predominantly polycentric features are less suitable to formal court adjudication. However, attempts to create a classification system for what issues should go to courts and what should not based on Fuller’s work proved elusive to those seeking to implement the third view of access to justice. A variety of widely divergent classification systems have been advanced, although reliable measures and data to evaluate the efficacy of alternative dispute resolution mechanisms have proved elusive. It has also been argued that alternative forms of dispute resolution are widely perceived as a second class form of justice intended to service the low income tier of the population. Authors such as Professor Fiss see in the movement from the second to the third wave of access to justice a crisis as to the existence of public values, not a question of institutional competence. In his view, adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, or any other contrivance of ADR, precisely because it invests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason.

In the second part of her paper, Professor Weinrib addresses the question of what deliberations on civil disputes must be in the court system as a matter of constitutional obligation. Here she addresses s. 96 of the *Constitution Act* of 1867 as amended, which provides: “The Governor-General shall appoint the judges of the Superior, District, and

County courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.” This section has been frequently litigated in recent years and various provincial attempts at moving classes of disputes out of the courts and into administrative agencies or other forms of dispute resolution have often been struck down. The courts have adopted a three part test—historical, functional and institutional—for s. 96. The first part of the test is an inquiry into the legal history of Superior Court jurisdiction: does the impugned jurisdiction broadly conform to jurisdiction exercised exclusively by superior court judges at Confederation? The second part of the test focusses on whether the tribunal is exercising a judicial function and is therefore performing the activity characteristic of federally appointed judges. The indicia of the judicial function are: parties who initiate control of the termination of the dispute, the application of recognized rules, the centrality of the parties’ rights, and fair and impartial procedures. The judicial function is distinguished from the administrative function which features a discretionary decision forwarding the broad social policy of a legislative scheme for the collective good of the community rather than rights of individuals who come before the decision maker; an untrammelled discretion “to get things right”; the application of specialized expertise to the problem. The third part of the test requires an examination of powers, already labelled as historically and functionally those of superior courts, in order to ascertain whether, in context, such powers are permissible to provincial appointees because they are ancillary to the primary, non-judicial functions.

The author goes on to note that the courts have held that privative clauses cannot oust judicial review of agency decisions, and that the Canadian Charter of Rights and Freedoms (particularly s.7) imposes judicially enforceable procedural proprieties on any administrative dispute resolution processes that may be adopted.

In the light of the normative considerations canvassed by the author in the first part of her paper and the constitutional considerations canvassed by her in the second part of the paper, she then proceeds to examine briefly two case studies on the merits of adjudication: workers’ compensation and human rights. With respect to workers’ compensation, she argues that the workers’ compensation regime in Ontario is a complex and multifaceted form of workplace safety regulation and compensation that is much more responsive to workplace safety than the tort system that it replaced and that permitting parallel access by workers to the courts with respect to tort claims may well endanger the entire system and cause its progressive unravelling. On the other hand, with respect to human rights complaints, she takes that view that the enactment of the *Ontario Human Rights Code* and the creation of the Ontario Human Rights Commission is not inconsistent with the preservation or recognition of individual rights of action for discrimination in the courts (despite the decision of the Supreme Court of Canada in *Bhaduria* to the contrary). The courts already exercise substantial appellate jurisdiction with respect to decisions by Human Rights Code adjudicators, and have substantial constitutional jurisdiction with respect to various forms of discrimination claims under the Charter of Rights and Freedoms. In contrast to the workers compensation regime, the author argues that providing claimants with alternative avenues through which to pursue their complaints (if they are prepared to bear the cost of litigation) is unlikely to endanger or cause to unravel the administration of the *Human Rights Code*.

The author concludes her study by arguing that rather than focusing substantial energies on devising alternative forms of dispute resolution to the court system, efforts should rather be devoted to streamlining court adjudication as much as possible – that is to say, concentrating efforts on devising ways of strengthening and supporting the effectiveness of the legal system.

The institutionalization of the legal system in the courts serves such an important role in society that it is important to keep it accessible and affordable and also to ensure that its efficiency, effectiveness and dispatch work to forward the values of justice.

(b) MARTHA JACKMAN, "THE REALLOCATION OF DISPUTES FROM COURTS TO ADMINISTRATIVE AGENCIES"

The author, in describing factors that favour administrative agencies over courts for the resolution of some classes of civil disputes, notes that historically, some agencies were established to respond to inadequacies in the judicial or common law approach to particular litigants and legal problems at the substantive, procedural or remedial levels. Some were created to provide expanded investigative and enforcement powers. Others were designed to regulate important areas of economic activity which require the weighing of complex economic, social and political considerations, and some agencies were put in place to address emerging areas of social concern which call for specialized expertise and greater opportunities for public participation.

A general characteristic of administrative agencies is the requirement that they take the public interest into account in their decision-making. In this regard, policy-making and administrative functions are often integrated into administrative dispute resolution processes and administrative agencies frequently possess investigative, supervisory, enforcement and other powers beyond those ordinarily exercised by courts, thus enabling them to manage rather than merely adjudicate disputes and to respond actively to issues such as power imbalances between the parties or the under-representation of certain interests. Administrative agencies also differ from courts in terms of appointments. Both federal and provincial law require that judges be trained lawyers with lengthy practice experience, which severely restricts the pool of eligible candidates. In contrast, administrative appointments can be tailored to a degree not possible in the courts through selection of appointees for specialized expertise, mediation, conciliation or other special skills, or personal characteristics more representative of the racial, cultural, and socio-economic makeup of their constituencies. The administrative process is also more flexible and more open to innovation than its judicial counterpart. Complexity and formality can be reduced, rules of evidence relaxed, procedures expedited, and alternatives to traditional adversarial style adjudication, such as inquisitorial fact finding, paper hearings, or mediation are more easily introduced. With respect to costs, administrative agencies have a much greater ability to control their budgets than courts, and to reallocate part or all of the financial costs of their proceedings through more flexible cost rules. A final distinguishing feature of the administrative process relative to courts is that the former process can offer greater third party participatory opportunities than does the civil justice adjudicative model with its emphasis on bi-polar private party disputes. To this end, rules of standing are frequently relaxed in administrative proceedings, and in some cases intervenor funding is made available for the express purpose of facilitating participation by interested individuals and groups.

On the other hand, three factors limit the effectiveness of administrative agencies as an alternative to the courts. First, s. 96 of the *Constitution Act* 1867 has been interpreted by the courts as placing significant limits on the ability of provincial legislatures to confer adjudicative powers on provincially created administrative agencies, even in matters of exclusive provincial jurisdiction, the courts taking the view that civil adjudicative functions should be undertaken by s. 96 judges appointed by the Governor General. A second limitation on the potential

advantage of transferring disputes from courts to administrative agencies is the increasing judicialization of administrative decision-making, as reflected as due process requirements stipulated by the *Ontario Statutory Powers Procedure Act*, and s. 7 of the *Canadian Charter of Rights and Freedoms*, which have imposed significant constraints on the ability of administrative agencies to adopt more flexible, informal, expeditious and inexpensive decision-making processes. A third factor weighing against the transfer of civil disputes from the courts to administrative agencies relates to the authoritativeness, real or perceived, of administrative as opposed to judicial decision-making. The judiciary is constitutionally protected from political interference both at an institutional level and in terms of individual court decisions. In contrast, the independence and authoritativeness of administrative decision-making is reduced by the susceptibility of administrative agencies not only to judicial review but to various forms of political over-sight or interference through control over appointments, salaries, and tenure of agency members, appeals from agency decisions to the executive arm of government, and the potential in some contexts for binding directives issued by the executive arm of government.

With these various factors militating for or against reallocation of civil disputes from courts to administrative agencies in mind, the author then applies these criteria to several contexts: residential tenancies in some detail; environmental disputes, wrongful dismissal claims, and professional malpractice claims more briefly. In the case of residential tenancy disputes before the courts, the author notes that recent studies suggest that a vast majority of actions are by landlords for eviction and/or arrears of rent and that only a tiny percentage of actions are brought by tenants. Of the total number of actions brought by landlords, fewer than one in three is defended. The procedure is perceived by tenants as intimidating, while landlords regard it as cumbersome, slow, costly, and often ineffective in terms of practical outcomes. The empirical evidence also suggests that there is a high degree of inconsistency in the way in which the *Landlord and Tenant Act* is applied from one court to the next.

The author argues that an administrative agency would have much greater ability to take steps to prevent landlord and tenant disputes from developing in the first place, through programmes designed to educate landlords and tenants about their respective rights and responsibilities under provincial legislation and that an administrative agency's functional flexibility would permit it to manage landlord and tenant disputes more effectively when they arise through carefully crafted inquisitorial or investigative mechanisms that may enable tenants to raise valid defences to landlord's claims in individual cases and that may enable investigation of more systemic patterns of complaints. The author also argues that the potential for mediation within an administrative agency system may allow for the resolution of disputes in a manner which preserves relationships and promotes consensual and realistic agreements. Transferring responsibility for dealing with residential tenancy matters to an administrative agency would also permit the substitution of a cadre of specialist decision-makers for the current mix of court officials and judges now adjudicating such disputes. She also argues that an administrative agency may be able to adopt simplified and expedited procedures for dealing with residential tenancy disputes that would also reduce costs to all parties and the public. An administrative agency may also offer advantages in terms of enhancing participatory opportunities in decision-making, particularly with respect to systemic issues.

In order to overcome the constitutional difficulties posed by s. 96, any proposal for the creation of an administrative agency in the residential tenancy areas requires that adjudication constitute only one part of the agency's administrative functions and must occur within a

broader regulatory framework. Thus adjudication could not be the sole or dominant function of the agency, and providing information, education, and mediation services should not be ancillary or unrelated aspects of the Tribunal's responsibilities. In addition, in order to ensure the authoritativeness of administrative decision-making in this area, the quality, training, and objectivity of appointees to such an agencies would be of crucial importance.

The author goes on to consider the case for reallocating environmental disputes from the courts to an administrative agency, particularly individual or class claims for damages or other relief, and argues for the consolidation of adjudication of such claims within an omnibus environmental agency. The functional flexibility of an administrative agency would give it important advantages in the investigation of complaints, in developing measures designed to address power imbalances between the parties, in designing and implementing mediation and conciliatory processes, and in remedial enforcement and supervisory functions. Appointments could be made among persons with special expertise in the environmental area. Procedures could be tailored to meet particular problems and needs. Measures could be taken to reduce the financial burden of bringing environmental actions forward, as well as encouraging broader interest group participation in decision-making. For similar reasons, she argues that wrongful dismissal claims of non-unionized employees might be more appropriately dealt with in an administrative forum, following the analogous roles currently played by the Employment Standards Administration of the Ministry of Labour under the *Employment Standards Act* and the Ontario Labour Relations Boards under the *Occupational Health and Safety Act*. She also argues that professional malpractice claims may also be more effectively dealt with by an administrative agency rather than the courts for similar reasons.

5. ENHANCING THE PERFORMANCE OF THE COURT SYSTEM

Three papers commissioned by the Fundamental Issues Group of the Civil Justice Review address different aspects of this topic: Kent Roach, "Fundamental Reforms to Civil Litigation"; Allan Stitt, Francis Handy, and Peter Simm, "Alternative Dispute Resolution and the Ontario Civil Justice System"; and Iain Ramsay, "Small Claims Court: A Review".

(a) KENT ROACH, "FUNDAMENTAL REFORMS TO CIVIL LITIGATION"

The purpose of this paper is to assess whether fundamental reforms can be made to civil litigation in the Ontario Court (General Division) to reduce delay and costs for both the state and citizens, improve the quality of decisionmaking, and enhance access to justice. The author notes that it is impossible to address reforms to the procedure and costs of litigation without exploring the purposes of litigation. This question engages an important philosophical debate about whether the primary purpose of civil litigation is to resolve disputes and achieve corrective justice between a single plaintiff and defendant, or whether it is to produce public law to order the behaviour of groups and organizations.

The author outlines the dynamic nature of disputes in Ontario society. Disputes arising from automobile accidents arise frequently but until recently were overrepresented in the disputes resolved in court. Disputes arising from complaints of discrimination also arise quite frequently, but are characterized by low levels of claiming and litigation.

The author notes some significant trends in claims filed in the Ontario Court (General Division) over the last few years. These include a dramatic drop in the number of statements of claim in relation to motor vehicle accidents following the introduction of no-fault

automobile compensation in 1990, some reduction in the number of statements of claim filed generally; a sharp decrease in the number of divorce trials in 1990; and a dramatic increase in the number of motions filed and heard. There have been marked declines recently in both the number of cases being added to trial lists and the number of cases being disposed of or settled at trial. A striking feature of recent data is that more courtroom time is presently devoted to hearing motions or applications than to hearing jury and non-jury civil trials. The number of civil pre-trials has also increased sharply. Statistics on backlogs of civil cases pending on the trial list suggest that the backlog has been increasing steadily, with a slight decline in 1994. A sampling of the oldest cases listed in Toronto found, however, that over half of these cases had in fact been closed although the court had never been informed of the fact. The author concludes from these data that the civil justice review should be more concerned with the number of motions filed and the judicial resources expended at the pre-trial stage than at the trial stage and that data on the civil backlog should be viewed with some caution.

The author then goes on to address factors affecting the commencement of civil proceedings. The fundamental barrier remains the cost of litigation both in terms of the requirement for a litigant to pay his or her own lawyer's fees (subject to partial indemnification if successful) and, if unsuccessful, to pay part of his or her opponent's legal costs. The author identifies hourly billing as the dominant factor in determining legal fees and argues that this creates incentives for lawyers to "over-lawyer" and impose unnecessary costs on their clients, their opponents, and the public. He outlines various strategies to limit reliance on hourly billing, including increased regulation through more accessible assessments of legal bills and regulated legal fees; amendments to the criteria in the *Solicitor's Act* for reviewing legal bills to emphasize value of the work done rather than hours expended; the legalization of contingency fees; and budgeted litigation. The author argues that contingency fees are not likely to diminish reliance on hourly billing unless they are expressed as a straight percentage of the award as opposed to a multiplier of the hourly rate. The author then considers the impact of the dominant cost rule in Ontario i.e. that costs follow the outcome of a case. In Ontario this is supplemented by Rule 49 which is designed to penalize litigants who refuse settlement offers which turn out to be as good or better than awards received at trial. The author notes that this rule has been accepted as part of Ontario's legal culture. However, courts have been reluctant to employ other cost rules which allow parties and lawyers to be penalized for unnecessary procedures in litigation. The author suggests that courts should be encouraged to make more disciplinary costs awards, and, in any event, to assess costs at the conclusion of each motion and at the end of the trial. Consideration should be given to allowing courts to require litigants to pay costs to the court for public costs incurred in unnecessary litigation, especially in relation to motions that do not attempt to dispose of cases or prevent irreparable harm, and in collection cases, at least where the corporate plaintiff is a frequent user of court services.

The author also considers that statutes of limitation should be reformed to maximize certainty about what limitation period applies and to repeal short limitation periods which may inhibit access to justice and stimulate premature litigation. Ultimate limitation periods can be used to preclude stale claims which impose significant costs on parties and the courts.

The author then goes on to evaluate the rules governing the aggregation of disputes which occurs when one lawsuit is used to resolve multiple claims often between multiple parties. In general, the author favours expansive rules on standing, preclusion by previous litigation, and certification of class actions to encourage the aggregation of claims. In his view, there is

probably too little public law litigation rather than too much. However, he acknowledges that the data indicates that cases made more complex by multiple claims take longer to dispose of and entail lower settlement rates. To the extent that aggregation of claims prevent a multiplicity of individual claims, however, there may still be a total savings in private and public costs.

The author then examines various procedures which enable a judge to decide a case without relying on oral evidence after full discovery but rather on affidavit evidence, which may be subject to limited cross-examination. More data is required on the use of Ontario's summary judgment rule but specific reference to the award of solicitor and client costs for its unsuccessful use may have limited its effectiveness both as a device for disposing of and managing cases. The British Columbia experience suggests that the introduction of a summary trial rule holds considerable promise of disposing of a substantial number of claims that are presently dealt with by actions in Ontario. Data collected by the British Columbia Supreme Court in Vancouver in 1991 revealed that about the same number of actions are disposed of by summary trial motions as by traditional trials. Thirty-three percent of summary trial applications result in a complete disposition, 27% result in an adjournment, 16% in settlement, 9% in dismissal of the application in favour of a trial, and 8% in partial disposition. In most cases, summary trial applications were heard within a two-hour time limit on Chambers applications and often in less time. Procedures such as applications and stated questions of law may allow the parties and the public to benefit from decisions on legal questions without the expense and time required to decide disputed issues of fact, which in most cases are only important to the immediate parties.

The author next considers the role of case management, interlocutory motions and discovery in civil proceedings. Case management has shown promising results in Ontario. Nevertheless, it has the potential for requiring more party and court resources to be devoted to litigation by subjecting the pre-trial stage of litigation to public intervention such as case conferences. Experiments should be conducted to determine if party-based case management such as having parties develop their own discovery plans and conduct their own pre-trial conferences can be as effective as official-based case management while requiring fewer public resources. Case management should attempt to eliminate the time and resources required for discovery, particularly motions related to disputes over discovery. Mandatory disclosure and the rules of privilege should probably be codified in an attempt to speed discovery and minimize disputes and motions over discovery. Attempts to eliminate oral discovery may harm access to justice in some cases and place excessive reliance on what the parties have chosen to reduce to writing about a claim. The submission of written questions may be a less drastic alternative to the conduct of wide-ranging oral examinations for discovery.

Appellate court should have the resources to identify areas of law that need to be clarified in order to increase settlement rates. They should be more proactive in consolidating cases and issuing judgments which attempt to resolve more general issues. Government should use the reference procedure when it can eliminate anticipated litigation over new statutes.

(b) ALLAN STITT, FRANCIS HANDY, PETER A. SIMM, "ALTERNATIVE DISPUTE RESOLUTION AND THE ONTARIO CIVIL JUSTICE SYSTEM"

In the paper, the authors propose a system for integrating mediation into the civil litigation dispute resolution process that could serve to increase the flexibility of dispute resolution and give greater access to justice for a wider range of disputants. While the term "alternative

dispute resolution” encompasses a spectrum of different processes from negotiation, to non-binding third-party intervention, to binding third-party intervention, the authors in this paper focus on non-binding mediation processes annexed to the court system. The rationale for integrating mediation into the civil litigation system is to save judicial and administrative resources, reduce unnecessary confrontation between the parties, increase the substantive and procedural satisfaction of the users of the civil justice system, and produce outcomes that the parties want to implement.

The authors note that there are two forms of mediation: rights-based and interest-based mediation. In rights-based mediation, a neutral third-party gives the disputants an independent assessment of the merits of the case and the likely outcome in the event of the dispute going to binding adjudication. A familiar example of rights-based mediation is a pre-trial conference. In contrast, in interest-based mediation the mediator seeks to have the parties focus on their underlying interests rather than on the potential outcomes of litigation. An interest-based mediator attempts to determine why the parties take the positions they do on the issues and encourages them to generate creative options to satisfy their interests. The authors argue that interest-based mediation has numerous advantages. First, the parties have an opportunity to express their feelings, needs and interests in a way that does not exist at discovery, trial or a rights-based ADR process. Second, the parties have the opportunity to play a substantive role in shaping the solution achieved. Third, because the parties have control of the resolution that is achieved and must agree to it, they have a stake in abiding by the agreement. Fourth, mediation can be accomplished quickly; in civil cases, mediation rarely lasts longer than a day and can often be completed in less than half a day. Fifth, mediation can be conducted in a non-adversarial and informal environment, which, in contrast to litigation, may improve or at least not further damage the relationship between the parties after the dispute is resolved. Finally, because mediation is a non-binding process, if parties are not satisfied with the resolution that they can achieve at mediation, they are free to continue with litigation. From a social perspective, mediation has the advantages of promoting settlements which might otherwise not occur, or earlier settlements than might otherwise be the case; or where settlement does not occur, eliminating or narrowing issues, thus reducing the scope of or need for discovery and hence the costs to the parties and the public.

The authors then consider which cases should be subject to mediation. They conclude that screening procedures or criteria are difficult to frame and are generally undesirable. Instead, there should be a presumption that all cases commenced in the Ontario Court (General Division) are appropriate for mediation. As to when mediation should be scheduled, the authors conclude that the best time to schedule a case for mediation is after the close of pleadings but before discovery—that is, not so late in the process that substantial public and private costs have already been incurred, but not so early that the parties do not have a reasonably well informed appreciation of their respective cases. As to whether mandatory mediation should be publicly funded, the authors conclude that court-annexed ADR should not as a general rule be publicly subsidized (in terms of the mediator’s costs). Where impecuniosity is a problem for participants, the costs of mediation should be dealt with on the same basis as the legal system deals with impecunious disputants generally. This general rule against funding is subject to the qualification that if a claim is settled at or within 14 days of mediation, the authors propose that the government subsidize the costs of a mediator’s services to a set amount, for instance the amount equivalent to an experienced mediator’s average hourly rate in the province. This approach is suggested in order to maximize the savings to the

public in administrative costs of litigation by creating an incentive for disputants to settle early. However, if the dispute does not settle, the parties would be required to absorb all the mediation costs.

As to who should undertake the mediation functions, the authors argue for privately-provided mediation services, with litigants being given the opportunity to select a mediator for their case from a pool of available and pre-approved mediators. They envisage that private mediators' qualifications would be subject to evaluation by the government or the courts prior to their certification as qualified mediators, and that their rates might also be regulated. Apart from avoiding a drain on the time of judicial and other government personnel, a system of private mediation is more likely to be able to maintain a private and confidential mediation process (which is key to effective mediation), without being vulnerable to constitutional challenges relating to requirements of public hearings and freedom of the press that a publicly staffed mediation regime may be subject to. However, mediated agreements would, as with settlements or compromises of legal claims generally, be enforceable by the courts. The authors consider that pre-trial conferences (which differ from interest-based mediation in that the former provide disputants with an evaluation of the likely outcome at trial) may still be appropriate even if mediation has previously occurred, in order to reduce the number and scope of trials.

(c) IAIN RAMSAY, "SMALL CLAIMS COURTS: A REVIEW"

Dubbed "The People's Court" by the media, many writers argue that since the Small Claims Court is the court most often encountered by the ordinary person, it is an important symbol of the legitimacy of the justice system. However, a variety of objectives have been attributed to small claims court: dispute settlement; social problem solving; effective debt enforcement by creditors; reducing caseloads in higher courts; access to low cost justice. The current Small Claims Courts in Ontario have grown out of earlier courts whose primary use was for the collection of debts. To an important extent, small claims courts continue to perform this function despite populist mythology to the contrary.

With respect to existing Small Claims Court processes, Small Claims Courts are not self-financed through fees but subsidized by government. This raises questions as to whether at least some classes of users of these courts e.g. frequent corporate users might be charged user fees on a full cost recovery basis. The present jurisdiction of the Small Claims Court extends to any action for the payment of money or the recovery of property where the value does not exceed \$6,000, although many classes of claims are dealt with elsewhere e.g. discrimination claims under the *Ontario Human Rights Act*, employment standards claims, social security claims. If a claim is defended, in many areas of Ontario there will be a pre-trial hearing before a Referee (a court employee), a part-time judge, or a judge. If there is a trial, the vast majority of trials will be before deputy judges who are not full-time judges but lawyers appointed by the regional senior judge with the approval of the Attorney-General. There are approximately 380 of these judges who sit approximately one day each month, are appointed for up to a three-year renewable term, and are remunerated currently at a per diem rate of \$235. While lawyers and paralegals can represent parties in Ontario Small Claims Courts, costs recoverable are generally limited to 15% of the amount claimed. Judgements obtained in the Small Claims Courts may be enforced by the Small Claims Court bailiff.

In 1993-94, 134,709 claims were filed in Small Claims Courts in Ontario. The majority of actions in Small Claims Courts continue to be debt actions brought by businesses against

individuals and mostly result in default judgements. In Toronto, the average time period from filing a claim to a hearing in contested cases is about six months. Ontario legislation currently permits appeals to higher courts where the amount in issue is over \$500 although a very small percentage of cases are in fact appealed.

A continuing criticism of Small Claims Courts both in Ontario and elsewhere, documented in empirical studies, is that it is not a people's court, but is used by relatively narrow demographic groups, and that many disadvantaged groups and minorities seem not to mobilize the law through court action.

In evaluating the role and performance of Small Claims Courts within the civil justice system, it is important to situate them within the larger landscape of consumer redress mechanisms. Continuing concern in consumer protection policy relates to the high enforcement costs of consumer rights, particularly in the area of economic losses. These costs may not only prevent consumers from attaining satisfaction but may also result in insufficient incentives for business compliance with legislation. The author examines two alternatives to the courts in the area of consumer redress: market complaint mechanisms and third party redress mechanisms. With respect to market complaints mechanisms, studies in Ontario and elsewhere indicate a relatively high complaints rate against suppliers in relation to perceived consumer problems, especially product purchase problems and tradespersons' services, but a much lower rate concerning professional and financial services. These internal complaints processes appear to work most effectively when buttressed by effective consumer remedies, such as a right of rescission, and bright-line rules established either by the industry in question or by legislation.

A characteristic development of consumer markets in many countries has been the development of alternative forms of dispute resolution including arbitration and mediation streams operated by industry, ombuds, and hybrid-industry/government redress mechanisms. Examples in Ontario and elsewhere include arbitration plans in the automobile and new home industry, compensation funds in the travel industry, and ombuds in the financial services industry. In addition, government consumer ministries often provide mediation for consumers with complaints. These informal consumer third-party redress mechanisms seem to have a mixed record, at least as measured by surveys of participant satisfaction. Clearer standards or bright line rules, ensuring a fair adjudication process, and adequate publicity of patterns of unacceptable practices are likely to enhance the effectiveness of these regimes. If the jurisdiction of the Small Claims Court is to be increased, as some commentators have proposed, the author argues that it would be irresponsible to extend the jurisdiction of the court without establishing accurate baseline data on the current operations of the court because without these data any evaluation of the impact of reform will be very difficult to undertake. Current statistics on the operation of a small claims courts in Ontario do not provide meaningful information on many aspects of the work of the courts, such as the processing time for contested and uncontested cases; the percentage of cases filed which result in default judgements; the nature of court users; or the types of cases processed. A potential implication of raising the jurisdiction of small claims courts may be to assimilate them more closely in their functioning to higher courts, exacerbating current problems of access.

The author advances a number of proposals for reforming the current operations of small claims courts:

1. There should be performance standards for the disposition of small claims cases, and there should be periodic attempts to measure the quality of service provided by the

various personnel in these courts, including the use of anonymous questionnaires to litigants.

2. While there is currently information available in English and French on small claims courts and the Ministry of the Attorney-General has developed a video on the courts, there are no guides to the court in the principal ethnic languages relevant to a given area nor has there been any attempt to provide documents or interpretation services in languages other than English and French. Information should also be available on the alternative options available so that consumers can make choices between using the courts or alternative redress mechanisms.
3. Individuals are disadvantaged by current rules which allow organizations to sue in distant venues. Actions against individuals should *prima facie* be in the defendant's home community or information should be provided on all statements of claim which allow an individual to make a simple application to change jurisdiction.
4. There should be greater imagination in the appointment and training of Small Claims Court judges. There is no reason that secondment to this court for two or three years could not be an attractive option for younger members of the Bar, supplemented by volunteer mediators.
5. It may be possible to generate differential pricing structures for repeat users (particularly creditors) of Small Claims Courts, so as to avoid public subsidies to credit provision and collection.
6. Individual plaintiffs with unpaid judgments against businesses should be encouraged, through enforcement information material, to notify the Ministry of Consumer and Commercial Relations concerning a judgement, where this information may be relevant to the licensing activity of the Ministry.
7. Credit enforcement measures should contain information about courses of action open to debtors and available sources of information and assistance.
8. Earlier experiments with the use of Duty Counsel in Small Claims Court should be extended e.g. through the use of student lawyers or articling students. There should be permanent advice centres in larger courts.
9. There is little systematic data about issues of access to justice in Small Claims Courts in rural areas of Ontario, which should be part of any base-line study before changes in jurisdiction are introduced.

6. ENHANCING THE PERFORMANCE OF THE ADMINISTRATIVE JUSTICE SYSTEM

MARGOT PRIEST, "FUNDAMENTAL REFORMS TO THE ONTARIO ADMINISTRATIVE JUSTICE SYSTEM"

The principal paper commissioned on this subject was authored by Margot Priest, "Fundamental Reforms to the Ontario Administrative Justice System".

The author stresses the large role played by the administrative justice system in the day-to-day lives of citizens of Ontario. Whether measured by the number of regulatory agencies that regulate or adjudicate on the rights and entitlements between individuals (including corporations) or between individuals and the state (approximately 82 agencies), the cost of the administrative system (\$185 million per year – greater than the cost of the civil justice system), staff and full-time appointees (approximately 1,600), or the number and range of decisions

made by agencies within the system (hundreds of thousands per year), in many respects the administrative justice system, perhaps more than the courts, is the face of the modern state for a majority of citizens.

While the author acknowledges the *ad hoc* nature of many administrative agencies in terms of the reasons for their creation, the scope of their mandate, lines of accountability to government, decisionmaking processes etc., and the historical contingencies surrounding these issues, she argues forcefully that the aggregation of administrative agencies performing regulatory or adjudicative functions need now to be seen as part of an administrative justice system with many more commonalities or potential commonalities than differences. She reviews the history of reforms and reform proposals in Ontario and elsewhere in Canada over the last several decades which emphasize common themes and concerns about the performance of administrative agencies.

By way of illustrating some of these themes and concerns, she looks selectively at the operations and performance of six Ontario agencies: the Social Assistance Review Board; the Criminal Injuries Compensation Board; the Workers' Compensation Board and Appeals Tribunal; the Ontario Insurance Commission; the Employment Standards Administration; and the Ontario Human Rights Commission and Board of Inquiry. A striking feature of these reviews is that many of the same concerns that have arisen with the court system arise with many of these agencies in terms of delays, access, and costs. The pathologies that many of these agencies have developed provides a useful antidote to any notion that moving civil claims out of the courts into administrative agencies provides an easy panacea to the problems of delay, access, and costs that are often perceived as afflicting the court system.

The author goes on to review a number of the fundamental features of the administrative justice system. These include the relationship of the system with other institutions of government, including the political and bureaucratic arms of government; the Ombudsman; and courts. She then addresses a number of techniques for better management of the administrative justice system, including coordinated decisionmaking between initial and subsequent decisionmakers; better case management and data collection; greater utilization of generic hearings and policy hearings; greater reliance on rulemaking; an enlarged role for mediation and alternative dispute resolution; the appropriate balance between formality and informality in decisionmaking processes; and the appropriate number and form of internal and external appeals and reviews of agency decisions. She concludes her study with a number of recommendations for fundamental reforms to the administrative justice system. These include:

1. The quality of the first level decision-maker is important; there is some evidence that the initial decision-maker does not receive the appropriate attention or emphasis in many administrative processes.
2. Where a process is not initiated at an agency but instead involves lower level decisions, the processes should, at some stage, be viewed as integrated. This is not to suggest that the independence and autonomy of the agency should be compromised, but to urge that the interrelationships between decisionmaking at the different levels be recognized.
3. Administrative justice system agencies must have adequate case management techniques, including methods of identifying major or urgent cases. "First come, first served" is not always the fairest or most efficient way to deal with cases. Similarly, case management systems should aid agencies in identifying issues suitable for generic proceedings or rule-making.

4. Administrative justice system agencies should be encouraged to use generic and policy proceedings. For some agencies, this may require legislative changes to enabling acts that emphasize or mandate individual decisionmaking. Generic proceedings may also require the availability of funding for the participation of certain disadvantaged groups in the process.
5. Administrative justice system agencies should be granted rule-making powers, either broadly or in selected areas depending on their individual mandates. Rule-making should be a public process and agencies should be required to begin consultations with the affected public as soon as possible, preferably at the problem-definition stage. Draft rules should be published, with a reasonable period of consultation and comment permitted. The draft rules should be submitted to the government (minister or Lieutenant-Governor-in-Council) for approval before promulgation.
6. Administrative justice system agencies should publish, after consultation with affected groups, the minister, and ministry officials, annual Statements of Priorities. The Statement should include a form of "regulatory agenda" to provide advance notice of the regulatory intentions of those agencies that will be using generic or policy proceedings or rule-making proceedings in the coming year. Annual reports of agencies should include an assessment of the activities of the agency in the past year in comparison to the projected activities and priorities as set in the Statement of Priorities for that year.
7. Administrative justice system agencies should be encouraged to continue their use of and experimentation with alternative dispute resolution techniques. Evaluations should include the development of better criteria to identify when a case is suitable for ADR and techniques for addressing imbalances of power and public interest mandates.
8. Appeals from the decisions of administrative justice system agencies to the courts should be eliminated or curtailed. If appeal provisions remain, they should be rationalized to permit only appeals on questions of law, with leave of the court. Greater emphasis should be placed on the rehearing and review powers possessed by all Ontario agencies, with additional emphasis on the role of the Ombudsman. Procedures for appeals should allow agencies to file affidavits with the courts to share expertise and experience.
9. Judicial review should be the mainstay of the superior courts' supervision of the administrative justice system. While deference to certain types of expertise continues to be appropriate, the courts should also welcome evidence of expertise in the form of affidavits to provide background to agency decisions in complex areas of policy or regulation.
10. The expertise of the Divisional Court should be strengthened. The original intention of the McRuer Commission to recommend a court that would develop an understanding of and expertise in the Administrative Justice system should be implemented.
11. An Ontario Administrative Justice System Council should be established to deal with such matters as discipline, investigation of complaints, enforcement of Memoranda of Understanding, performance appraisals, training, and ongoing policy and research on administrative justice.
12. The process of appointments to administrative justice system agencies should be depoliticized. The Ontario Judicial Appointments Advisory Committee is a possible

model. An independent body that advertises vacancies, establishes selection criteria, interviews candidates and provides a ranked list of candidates to the Premier should be established. An Administrative Justice System Council could perform these functions. All administrative justice system appointments should be the responsibility of the Premier, upon agreement by the Lieutenant-Governor-in-Council, in recognition of the importance of the administrative justice system.

13. Rationalization initiatives already begun by the Management Board Agency Reform Project should be encouraged. These should include more extensive use of cross-appointments, merger or co-location of families of agencies with similar missions, and more effective use of the human resources represented by the members of the administrative justice system agencies. Serious consideration should be given to removing the responsibility for administrative support from individual ministries and consolidating these into a single body, possibly the Administrative Justice System Council.
14. The administrative justice system agencies should be treated as the single system that it is. This could be enhanced by having all these agencies report to the Legislature through the Premier or the Attorney General rather than through various individual ministers. All policy directives and political appeals, if they continue to exist, should be the responsibility of the Lieutenant-Governor-in-Council, not an individual minister.

7. BARRIERS TO ACCESS TO CIVIL JUSTICE FOR DISADVANTAGED GROUPS

IAN MORRISON AND JANET MOSHER, "BARRIERS TO ACCESS TO CIVIL JUSTICE FOR DISADVANTAGED GROUPS"

The paper commissioned on this subject was authored by Ian Morrison and Janet Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups". In their paper, they question, in fundamental ways, what is meant by "access to civil justice", by "disadvantage" or "disadvantaged groups", and what "disadvantage" means in relation to civil justice. They also question the appropriateness of defining a "disadvantaged group" by reference to lists of examples, as is commonly done. The list approach, they argue, obscures the fact that the disadvantages many people experience derive from the reality that they are simultaneously members of more than one oppressed group and that the intersection of these various axes of oppression shapes the nature of oppression which they experience. Access to civil justice, if primarily conceived of as access to the civil courts, wherein costs and delay are understood to be the primary barriers to justice, is of marginal importance to disadvantaged people whose lives are much more centrally affected by notions of substantive justice and substantive policies that relate to the distribution of resources otherwise distributed unequally in a market economy. To the extent that disadvantaged people are likely to be affected by the legal institutions of the state, it is the "tribunals of everyday life" that are implicated in the administration of the welfare state, rather than courts, and impediments to justice that extend well beyond costs and delay that are likely to be of importance to them. In this respect, the authors are highly critical of recent federal and provincial policies that entail or portend a dramatic contraction of the welfare state and of access to legal aid programmes that may enhance access by the disadvantaged to agencies of the welfare state that adjudicate on entitlement issues.

The authors proceed to review barriers faced by disadvantaged people in accessing law and the legal system. These barriers include legal information and the formation of legal consciousness, where the authors are critical of “plain language” rhetoric that presupposes there is no contest over what it is that ought to be communicated, particularly in contexts where the claims of the disadvantaged are against government with respect to entitlements. In this respect, the authors argue that the issues of deciding what information should be created, the form and content of the information and modes of dissemination should be carried out in cooperation with community-based groups and non-governmental agencies specializing in public legal education. Another barrier to access for disadvantaged people relates to issues of dependency and vulnerability, where individuals are often in an ongoing relationship with various government bureaucracies for much of their lives. This dependency on government agencies and vulnerability to retaliation in the event of pursuing complaints about decisions or conduct within these agencies inhibits individuals, either with or without representation, from prosecuting justified complaints. A further barrier to access relates to the financial costs of pursuing formal complaints, most prominently the costs of legal services, but also lost time from work, monies paid for travel, monies paid for child care etc. The authors advocate loosening the legal profession’s monopoly on the provision of legal services so as to provide a much larger domain for para-legals and community advocates, both reducing the costs of legal services and improving the quality of these services. A further barrier to access relates to delay, particularly with respect to entitlement claims. Here the authors argue that agencies should develop systems for prioritizing cases based on some notion of the form or scale of harm that is likely to be caused to a claimant in the event of delay. Other barriers identified by the authors include physical barriers to access to court and agency facilities, and language barriers where translation services are not provided.

While traditional notions of due process and the adjudicative formalities that these entail may often raise barriers to access, the authors urge caution in wholesale adoption of various forms of alternative dispute resolution, including mandatory mediation, of which they are highly sceptical, principally on the grounds that imbalances in power in many relationships or interactions render disadvantaged people vulnerable to abusive outcomes in mediated settlements of claims. However, in this respect, they note an important caveat with respect to aboriginal persons, where long-standing cultural traditions of conciliation and accommodation through informal consultation and discussion processes argue strongly for substantial autonomy in the administration of their own civil justice system as an element of broader conceptions of aboriginal self-government.

The authors then describe how the unrepresentative character of lawyers, judges, other decision-makers in the civil justice system, and administrative personnel, who for the most part are from socially and economically advantaged groups, and are under-representative of minorities and women, discourages disadvantaged people from pursuing civil claims through courts or administrative agencies. When claims are pursued, disadvantaged people all too often encounter insensitive or unsympathetic responses from decision-makers who share little or nothing in common, in terms of economic, social, and cultural experience with disadvantaged claimants. Hence, the authors argue that steps should be taken to make the judiciary and the legal profession much more representative.

With respect to advocacy and access to justice, the authors argue for a much broader conception of the appropriate qualifications of advocates on behalf of disadvantaged people and a corresponding loosening of the legal profession’s monopoly on advocacy services. They are

also highly critical of cutbacks in the funding of the Legal Aid Programme in Ontario, noting special concerns that funding to clinic programmes, which unlike the Judicare model, principally concern themselves with the legal problems of the poor and the disadvantaged, and argue that claims to welfare and related entitlements from government should be protected from financial retrenchments to the legal aid programme. In facilitating the participation by disadvantaged people in the shaping of legal norms and taking collective action in this respect, the authors argue for special funding of public interest litigation, a relaxation of rules on standing to sue and intervention, and amendments to cost rules to insulate public interest groups from exposure to liability for the other party's costs (particularly where the government is the defendant), in the event of an unsuccessful challenge to existing government policies or administrative practices.

TOPIC I

PERCEPTIONS OF THE PROBLEM: THE VIEW OF THE STAKEHOLDERS

PUBLIC PERCEPTIONS OF THE CIVIL JUSTICE SYSTEM

SANDRA WAIN

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PUBLIC PERCEPTIONS OF THE CIVIL JUSTICE SYSTEM*

SANDRA WAIN

1. INTRODUCTION

(a) SCOPE AND PURPOSE OF PAPER

This paper describes existing research on public perceptions of the justice system in Ontario. Part I examines research which has looked at general public perceptions of the justice system. Part II provides a summary of the perceptions of specific groups who were consulted during the course of the Civil Justice Review, including the bench, the bar and a number of public interest groups.

For purposes of this paper, the “civil justice system” is defined primarily in terms of the legal profession and the civil courts. Only very limited consideration is given to other kinds of civil dispute resolution processes: e.g. administrative agencies, private dispute resolution processes (such as those provided by insurance companies or consumer complaint departments) and informal methods of dispute resolution (such as self-help). The primary focus here is on when people turn to lawyers and courts to resolve their legal problems and whether they perceive the legal system as a fair and effective means of resolving disputes.

(b) PUBLIC POLICY IMPLICATIONS

This paper does not examine in detail the public policy implications arising from existing research on public perceptions of the justice system. However, several aspects of this research are worthy of note in relation to any future efforts at civil justice reform.

First, civil justice reform does not appear to be a high priority in the public mind. Therefore, if the system is to be reformed, the impetus for reform will likely have to come from elsewhere, most likely from the bench, the bar or the government. Second, perceptions of the system vary considerably depending on who is being asked for their views and how they are being asked. As has been pointed out, insiders and outsiders may have quite different perspectives on the issues to be addressed in any reform of the civil justice system:

... competing perspectives on what it means to improve the civil justice system can be grouped into two main categories. One such perspective, typically that of the internal participant in the litigation process, understands the key issues to be those of distribution of disputes or administration of the system: given such-and-such a demand for judicial adjudication, how can the demand best be met?

Another perspective, typically that of the users and non-users of the system, understands the key issues to be those of allocation and recognition: is the legal process in any of its forms the optimal vehicle for dealing with different kinds of interpersonal and social conflict?¹

The views of the bench and the bar reflect the concerns of those most familiar with the civil justice system, but they do not necessarily reflect the concerns of other members of the public

* The views expressed in this paper do not necessarily represent the views of the Ministry of the Attorney General or the Civil Justice Review.

¹ Macdonald (1995: 16).

The views of the bench and the bar reflect the concerns of those most familiar with the civil justice system, but they do not necessarily reflect the concerns of other members of the public (many of whom have extremely limited knowledge about, or contact with, the system) or of particular sub-groups of the population (who may have a distinct, but strongly held, view about particular aspects of the system.)

Third, relying on “general perceptions” to define “general problems” and to prescribe “general reforms” may result in ineffective reform. There appears to be a considerable range of public views about the civil justice system, depending on the particular type of legal problem at issue: family law, tort and commercial cases, for example, may be perceived as having different kinds of problems which require different kinds of solutions. There is a need to look more closely at specific problems in different types of cases and to provide specific solutions to those problems.²

Fourth, in formulating reforms to the civil justice system, it is important to keep in mind the gap between “perceptions” and “reality”. It would obviously be a mistake to rely on perceptions alone as a guide to action. However, because we have extremely limited empirical information about how the civil justice system works (e.g. why case loads rise or fall, how and why certain cases settle), there will likely continue to be strong reliance on perceptions to both define problems and prescribe solutions.³ This approach has not provided effective reform of the civil justice system in the past.

It is worth noting in this regard that civil justice reform efforts in the United States have been criticized on the grounds that they have proceeded on the basis of unproven perceptions of problems, unsubstantiated allegations of the consequences of these problems, and untested proposals for reform.⁴ However, recent legislative reform efforts in the United States have acknowledged the need for more and better empirical evidence about the civil justice system as a prerequisite to large-scale reform. In enacting the Civil Justice Reform Act of 1990, Congress established some general principles to guide civil justice reform in the federal courts, but permitted districts to develop their own particular plans for reducing cost and delay. This period of experimentation is to end in 1997 and the results of the various rules, methods and techniques adopted within each district are to be analysed and assessed. At the request of the Judicial Conference, the Rand Corporation’s Institute for Civil Justice is tracking 10,000 civil cases which, it is hoped, will provide an empirical basis for uniform and effective civil justice reform in the future.⁵

² On the importance of disaggregating civil justice data (and looking at the scope and nature of perceived problems in different kinds of cases, and in different localities) see Macdonald (1995: 19) and Galanter (1986). See also the empirical analysis of civil cases commenced and tried in Toronto which was undertaken for the Civil Justice Review: Twohig et al. (1996).

³ To take the easiest example, we do not know what caused the rise in civil caseloads in the late 1980s and early 1990s: some may perceive it to be the result of a shift to “greater litigiousness” on the part of the public; others may see it as a response to an increase in real legal problems (e.g. an increase in debt and property cases related to the recession.) See Twohig et al. (1996) for a discussion of factors which may have influenced the volume of civil caseloads in Toronto between 1974-1994.

⁴ For a critical assessment of the fractious political debate over civil justice reform in the United States, see Galanter (1993).

⁵ A brief description of the legislative history of the Civil Justice Reform Act, and the preliminary findings of the Rand study are found in Dunworth and Kakalik (1994). Mullenix (1994) criticizes the Act for its continuing

2. STUDIES OF PUBLIC PERCEPTIONS OF THE JUSTICE SYSTEM

(a) RESEARCH METHODS

(i) Public Surveys

Research on public attitudes to law and legal institutions has been carried out using a number of different research methods, but public surveys are by far the most common way of assessing public attitudes towards the justice system. Surveys have been used to measure the public's concern and knowledge about the justice system, as well as its faith in law and legal institutions. Surveys have also explored the public's legal needs, and have provided some evidence about when and why people "turn to law" to resolve their disputes. Finally, surveys have examined the question of how users of the justice system perceive different legal processes and the relative strengths and weaknesses of different methods of dispute resolution.

Surveys involve quantitative analyses of responses to questions by a representative sample of the public. They have the great strength of being able to provide a broad overview of public opinion. As survey techniques and analysis have become more sophisticated, surveys have been able to provide more and better information about public attitudes and opinions.⁶ In particular, the use of "focus groups" has permitted researchers to improve the design of large-scale surveys by pre-testing questions and issues with small groups.⁷

However, surveys have a number of significant weaknesses. First, answers to survey questions may be based on a "one-time", hastily considered assessment by the respondent of the question being posed. Answers do not necessarily reflect the depth or stability of the respondent's views. As a result, surveys may reflect "mass opinion", but not necessarily "public judgment":

... top-of-the-head responses to simple polls reflect mass opinion; they tend to be volatile, have little internal consistency and indicate the respondent may be giving a response without accepting (or even considering) the consequences of the view. On the other hand, public judgment is characterized by acceptance of the consequences of the opinion, by firmness (indicating the view changes little over time) and by consistency between this view and others held by the respondent.⁸

reliance on "perceptions" as a guide to civil justice reform, particularly in relation to rules relating to discovery. Senator Joseph Biden, the Act's sponsor in Congress, answers these criticisms by noting that the purpose of the Act is to "launch an unprecedented formal effort to systematically compile empirical data on the efficacy of various reforms as the foundation for future uniform solutions" (Biden (1994: 1292)). It should be noted that the Australian Access to Justice Advisory Committee has also stressed the importance of empirical information in identifying problems with the court system, permitting experimentation with innovations, evaluating pilots and identifying "best practices": Access to Justice Advisory Committee (1994: 389-412).

⁶ For example, computer-assisted telephone interviewing has permitted greater flexibility in the nature of the questions posed and factor analysis has permitted researchers to explore the independent and interactive effects of several variables simultaneously, thereby permitting a more complex picture of factors influencing public opinion: Roberts (1994).

⁷ Focus groups consist of small groups made up of members of the public who are subjected to in-depth interviewing by a moderator. The data generated through a focus group are "oft"(qualitative and subject to interpretation by the moderator) and there is a risk that the moderator's own views will intrude into the situation and affect responses. Nonetheless, focus group results can be helpful as an exploratory technique in survey design because they provide the researcher with a sense of the general kinds of issues that should be pursued in the survey.

⁸ Roberts (1994: 77).

A second, related criticism of public surveys is that they cannot provide a very complex or subtle understanding of public views of the legal system. Public surveys require respondents to answer questions established in advance by the researcher: they do not permit people to tell their own stories, in their own way, and inevitably omit from their results any understandings of law and legal institutions which are culturally or socially specific.

Third, surveys cannot provide a sense of whether or how public attitudes have changed over time: they can only provide a “snapshot” of public attitudes at a particular moment in time. Comparing the results of public surveys taken at different times permits researchers to measure the extent of any shifts in public attitudes, but it cannot provide an explanation of why those shifts have occurred.⁹

(ii) Qualitative Studies

Qualitative research, particularly research involving in-depth interviewing of individual subjects over an extended period of time, can provide a more nuanced understanding of the public’s views and attitudes about the justice system, and the ways in which these change over time.

“Ethnographic” studies, which carry out this kind of research in a community setting, and with a view to understanding how the members of a particular community use and understand law and legal institutions, can provide valuable insights into the ways in which social and cultural factors shape the public’s perceptions of the legal system.¹⁰ It should be noted that ethnographic research need not be restricted to a geographical community, such as a town or neighbourhood: it could involve the study of dispute resolution in any network of social relationships with a common culture, including (for example) an ethnic, religious or business community. Ethnographic studies which have examined attitudes to the justice system have typically come up with a far more complex and unstable set of public attitudes to law and legal institutions that can be captured by the kinds of “one shot” questions posed in surveys.¹¹

Although qualitative studies can provide a type and depth of analysis not otherwise available, they also have some important drawbacks. For one thing, they are very time-consuming and expensive, compared to public survey research. In addition, qualitative studies

⁹ This kind of historical research is difficult in Canada because there is no central clearing house for public opinion surveys relating to justice issues. (The Roper Center of Public Opinion and Polling fulfils this function in the United States.) As a result, public survey information is often lost once the pollster delivers the poll results to the client and no ‘collective memory’ of public survey results develops. A central clearing house would provide more opportunities for historical analyses and permit researchers to track changes over time: Roberts (1994: 2).

¹⁰ See, for example, Merry and Silbey (1984) which explored attitudes and behaviours towards disputing in three neighbourhoods and found a relatively low use of mediation centres employing decision-making models which were insensitive to local cultural values and beliefs. Ethnographic studies have often been used to counter incorrect or negative assumptions about minority cultures, a classic example being William Foote Whyte’s fieldwork in a Chicago slum which took issue with the view that poor neighbourhoods were “socially disorganized” (Whyte, W.F., *Street Corner Society*, 1955, Chicago, Chicago University Press.) The emphasis in this research on the importance of understanding cultural context and the cultural specificity of rules and meaning fits easily with newer theoretical perspectives in social science (and other disciplines) which emphasize the importance of public discourse and the social construction of meaning.

¹¹ For example, Susan Silbey’s research collecting “stories of law” among New Jersey residents suggests that people’s support for, and acceptance of, legal constructions and formal legal procedures are highly contingent and vary across time and across interactions: Silbey and Ewick (1994); Silbey (1995).

put heavy reliance on the quality and objectivity of the researchers' observations. The researcher must not only take care not to intrude his or her own beliefs and perspectives into the data collection process; but must also organize a mass of qualitative data while maintaining a "neutral" perspective on the issues.

(b) LIMITS OF EXISTING RESEARCH

Where possible, this paper includes evidence from a range of different types of research. However, given the limited range and scope of existing Canadian research, the conclusions that can be drawn about public perceptions are both modest and tentative.

Some of the discussion in this paper draws on American sources.¹² It is not possible to assess whether or to what extent the results of these American studies can be transferred to Ontario: they are included here as illustrations of the general findings which have emerged in the American context and of issues which may be worth exploring in Ontario.

(c) RESEARCH RESULTS

This part of the paper looks at research which has examined the following aspects of the public's perception of the justice system:

1. Public concern and knowledge about the civil justice system
2. Public support for, and confidence in, the civil justice system
3. Public use of the civil justice system
4. User satisfaction with the system as a mechanism for resolving disputes

(i) Public Concern and Knowledge about the Civil Justice System

a. The Level of Public Concern about Justice-Related Issues

Justice-related issues do not appear as issues of "top importance" when respondents to surveys are asked open-ended questions about the public policy issues they consider to be most important. Over the past ten or twenty years, polls have consistently found that the most important concerns of most Ontarians (and Canadians) are economic: i.e. unemployment, the state of the economy, inflation, the deficit or taxes.¹³

However, when provided with a list of public policy issues, most Canadians do assign a very high priority to criminal justice issues: specifically, ensuring that the justice system provides an effective response to crime. Public concerns about crime are particularly important at the local level.¹⁴ Concerns about the civil side of the justice system, on the other hand, do not appear as high priority issues at any level.

¹² American research on civil justice issues is supported by a number of public and private institutions with an interest in the development of civil justice policies, including the Rand Corporation's Institute for Civil Justice, the National Center for State Courts, the Institute for Legal Studies at the University of Wisconsin and the Federal Judicial Center.

¹³ Environics (1994b). See also: Moore (1985: 48).

¹⁴ "Ontarians continue to see crime primarily as an issue that affects them closer to where they live, in communities, neighbourhoods, cities and towns, rather than in the province or nation as a whole": Environics (1994b: 6).

As noted above, given the apparent lack of public concern about the state of the civil justice system, it is unlikely that civil justice reform will be pushed onto the public policy agenda as a result of public pressure.¹⁵ It is much more likely that civil justice reform-- if it is to proceed-- will have to be driven forward either by government priorities or by the efforts of those with a stronger and more direct interest in reform: i.e. the bench and the bar.

b. Public Knowledge about the Civil Justice System

One finding that does emerge clearly from existing surveys of public attitudes is that public legal knowledge is very limited.¹⁶ For example, an Angus Reid poll conducted in 1992 shows that most people have little concrete knowledge of the *Charter of Rights*: half of all respondents were unable to list any specific right guaranteed by the *Charter*.¹⁷ Similarly, most people appear to know very little about the mechanisms for resolving legal problems through the justice system.¹⁸

Just as important, many respondents do not seem to make any clear distinction between civil and criminal justice issues when responding to survey questions:

Although legal matters, and particularly criminal law issues, are of great general interest, public legal knowledge is very sketchy, and reflects little understanding of the structure and function of the law. An example of this is the fact that a significant minority of Canadians have trouble distinguishing between the civil and criminal law. In 1994, a poll found that fully one third of the sample were unsure of the distinction, even after having received a brief explanation.¹⁹

This point is illustrated by a focus group study conducted in Ontario in 1994 which found that participants had some difficulty bringing forward any "view" of the civil justice system:

Prompted to identify issues that involve the justice system, participants quickly mentioned police, courts, sentences, lawyers, judges, correctional institutions and laws: all focused overwhelmingly on the criminal rather than the civil side. Only with very direct prompting did participants identify

¹⁵ As noted above, civil justice reform did take a place on the political agenda in the United States during the 1980s, particularly after then Vice-President Quayle entered the debate over the "litigation explosion" by raising concerns about the negative impact on the international competitiveness of American business of costly and "excessive" litigation.

¹⁶ Currently, the public appears to get a great deal of its information about the justice system through the public media, and in particular through the television, via news, public affairs and crime drama programs. Virtually all Canadians (96%) believe that information about the law is important, and the vast majority (90%) are insecure about their current knowledge of the justice system. Many Canadians believe that the government should provide more legal information. However, the main kind of justice information which Canadians are seeking is information about their legal rights and responsibilities within the criminal justice system: Environics (1987: 3, 41, 44).

¹⁷ Angus Reid (1992).

¹⁸ Gallup Poll (1990). By contrast, it should be noted that an American study of tort litigants found that people actually involved in legal proceedings considered themselves as having a reasonably good understanding of the law and the proceedings: Lind (1989: 73).

¹⁹ Roberts, (1994: 31, citing Insight Canada (1994)).

such aspects of the justice system as ... family law, small claims courts, or other civil components such as landlord/tenant disputes.²⁰

Participants in this study also had difficulty envisioning how the civil side of the system worked or how they might make use of it:

When subjected to a scenario of having to approach the system on a civil matter such as a landlord/tenant dispute or a small claims court case, most participants had difficulty envisioning the process or articulating a through-line of activities that would lead to a positive outcome. Most felt they would only be well-served if they “called a lawyer” and obtained advice on how to proceed.

... participants had considerable difficulty identifying [the justice system’s] personal importance to them. Its broad purpose and personal benefit was described as “providing security”, “safety” and “maintaining order in society”: again, the system as an accessible, reliable source of fair, reasonable, equitable resolution of problems on the civil side was not a natural part of the defining mix.²¹

This focus group suggests the need for researchers to pay greater attention to the distinction between criminal and civil justice issues when formulating questions. As noted below, there is a risk that respondents to surveys have in some cases answered questions with specifically (and exclusively) criminal justice issues in mind.

(ii) Public Views of the Fairness and Efficiency of the Legal System

Public surveys designed to measure the degree of public support for, and confidence in, law and legal institutions have generally asked two kinds of questions. The first type of question is aimed at examining public perceptions of the legitimacy and fairness of the justice system. These questions attempt to assess whether people adhere to the belief that the legal system reflects a set of shared community values and provides a forum for the fair resolution of civil disputes. The opposing set of public attitudes would be public alienation or resistance to law and legal institutions and a belief that the legal system favours the rich and powerful.

The second type of survey question attempts to measure the public’s perceptions of the justice system in terms of its instrumental value. In these questions, the purpose is not to assess whether the public believes that the legal system is fair or just; but whether it provides an effective (cheap, quick and authoritative) method of resolving disputes.

Needless to say, there is some overlap between these two kinds of questions: e.g. if the system is inaccessible due to its cost, people may not only view it as having little instrumental value; they may also view it as being only for the rich. However, the two kinds of questions do tap into different aspects of the public’s legal consciousness and, as discussed below, people do appear to make distinctions between “fairness” and “effectiveness” when assessing the system.

²⁰ Environics (1994a).

²¹ Environics (1994a: 5-6). See also: Bogart and Vidmar (1990: 42-44).

a. The Legitimacy and Fairness of the Civil Justice System
- “Do You Support a Strong Legal System”?

Survey results suggest that Canadians support a strong justice system and are willing to invest in the system to make sure that it functions effectively. For example, a survey conducted in Montreal, Winnipeg and Toronto in 1980 by the Legal Research Institute found that a majority of respondents were generally supportive of the need for laws and a strong justice system:

Virtually all respondents believed that laws were necessary to avoid chaos, to act as guides for living in society, to check impulse, and to prevent people from simply “doing what they wanted to do”. The majority indicated that the law did not have too much control over their personal lives and that a certain amount of regulation and restriction was inevitable and necessary in society.²²

The 1987 survey on the legal needs of the public in Ontario (referred to above) came to similar conclusions.²³ In addition, a 1987 Department of Justice survey found that:

- 96% of Canadians believe it is important to maintain a good justice system, regardless of the costs;
- 80% agree that the justice system is a relatively good use of taxpayers’ money.²⁴

Some care must be taken in interpreting the results of these surveys. First, as noted above, when respondents to surveys are left to define the “justice system” subjectively they generally do so in terms of the personnel and institutions of the criminal justice system: police, courts, lawyers and prisons. Expressions of support for a strong justice system may therefore be based primarily on a perceived need to deal effectively with “the crime problem” and not to any significant degree on the need to ensure an effective justice system for the resolution of civil disputes.²⁵

Second, there are some significant demographic variations in the extent to which Canadians express support for the justice system. For example, the 1980 Legal Research Institute Study found (perhaps not surprisingly) that:

Higher levels of education and income were positively associated with satisfaction with the current operation of the legal system, the view that the law represents a consensus, a lack of support for law enforcement and law reform as priorities, and the belief that the law gives too much protection to criminals. Higher levels of education were also associated with less willingness to comply always with the law, and the tendency to see government abuses as serious.²⁶

²² Moore (1985: 48).

²³ Bogart and Vidmar (1990).

²⁴ Environics (1987).

²⁵ This is not to suggest that the maintenance of an effective civil justice system is unimportant to Canadians: it is simply to say that many existing polls confound the issue by not making clear whether the results apply equally to the civil as well as the criminal system.

²⁶ Moore (1985: 49).

In addition, this study found men more supportive of existing legal institutions than women and older people more so than younger people.

– “Is the Justice System Fair?”

It is very difficult to make sense of public survey results based on questions about the “fairness” of the justice system: when the public has been asked for their views about whether the justice system is “fair”, surveys have produced results which are usually ambiguous, and in some cases, contradictory.

In the 1987 Department of Justice survey, for example, 75% of respondents stated that they believe the law treats everyone fairly; but 75% also stated that they believe that the law favours the rich. Similarly, in the 1987 study of the public’s legal needs 65% of respondents believed that the legal system is fair; however, about half of all respondents also reported that they agreed with statements that they felt as though they were victims of business or government in relation to the legal problems they were experiencing.²⁷

A 1994 nation-wide Insight Canada poll found that about two-thirds of the respondents felt that the civil justice system was “fair”. By contrast, a 1994 Environics survey found that only 41% of Ontario respondents (37% nation-wide) reported that they believe the justice system is “fair”. The differences in results between the two polls were likely due to the fact that the Insight Canada poll asked only about the civil side of the system. The Environics Poll, on the other hand, asked generally about the “justice system” and therefore probably reflected negative public perceptions about the fairness of the criminal justice system.²⁸

One of the findings which emerged from the 1987 study of legal needs in Ontario was that confidence in the legal system varies among different subgroups of the population and with the type of legal problem being experienced. For example, aboriginal people appear to have substantially less confidence in the justness or fairness of the legal system than other groups, and there is a higher level of dissatisfaction with the system in relation to family law disputes than other types of disputes.²⁹

b. The Effectiveness of the Civil Justice System

Canadian survey research on the effectiveness of the legal system is very limited notwithstanding the fact that instrumental concerns (i.e. concerns about cost, delay and complexity) are at the forefront of most recent civil justice reform efforts.³⁰

²⁷ Bogart and Vidmar (1990). The 1980 Legal Research Institute survey also found that a majority of recipients believed that the civil system favoured the rich and powerful (particularly business); Moore (1985).

²⁸ Roberts (1994), Environics (1994b). This observation is supported by the results of public surveys included in the recently released report of the Royal Commission on Systemic Racism in the Justice System, which found that a substantial proportion of the population perceives the criminal justice system to be biased against racial minorities.

²⁹ Bogart and Vidmar (1985).

³⁰ See the discussion in Part III below.

– **“Is the Justice System Sound?”**

An Environics survey of Ontario residents conducted in 1994 found that about two-thirds of respondents expressed the view that the justice system is “basically sound” (16%) or “basically sound but needs some improvements” (47%).³¹ Once again, however, it should be noted that this study made no distinction between the civil and criminal sides of the justice system. Public concerns about the effectiveness of the criminal justice system may have had a negative impact on the survey results.³²

– **“Does Civil Justice Take Too Long and Cost Too Much?”**

In some cases, surveys have asked more specific questions about whether respondents view the legal system as too costly or too expensive. The 1980 Legal Research Institute survey found that many respondents believed that the civil justice system is too expensive and takes too long to get anything done. Similar results were reported in the 1987 survey of the legal needs of the public: 72% of respondents agreed that the cost of disputing a legal problem would likely dissuade them from doing so, and 77% of respondents reported that they would expect there to be a lot of delays in getting legal problems resolved through the court system.³³

– **“Does the Legal Profession Serve the Public Well?”**

Another specific question which has sometimes been addressed in surveys concerns public evaluations of the cost and quality of lawyers’ services. Generally, the public appears to have fairly negative perceptions of the legal profession. Respondents to the 1980 Legal Research Institute survey expressed little confidence in the legal profession, seeing lawyers as self-interested, more concerned with making money than helping their clients and not doing enough to inform the public of how the legal process works. The 1987 study of the legal needs of the public in Ontario produced similar results.³⁴

(iii) Public Use of the Legal System

Rather than asking people directly what they think of the legal system, a number of studies have examined the question of when and why people “turn to law” to resolve problems. Public surveys which have looked at this issue provide a useful corrective to the view that “everyone is suing everyone for everything.”

On the basis of what is known from public surveys, the “universe” of disputes can be imagined as a broad-based pyramid with all perceived legal injuries at the bottom and disputes resolved through the courts at the top: only some grievances will become claims, only some claims will become disputes, only some disputes will become legal disputes, and only some

³¹ Environics (1994b). It is not entirely clear whether questions about the “soundness” of the system are intended to capture public perceptions of fairness, effectiveness, or both. For present purposes, it is assumed that they provide some indication of the level of public confidence in the effectiveness of the system.

³² Roberts (1994: 5).

³³ Moore (1985); Bogart and Vidmar (1990).

³⁴ Moore (1985); Bogart and Vidmar (1990). Similar results were found in earlier polls: See Yale (1982).

legal disputes will end up being resolved through the courts. Surveys of the public's legal needs have found that an extremely small proportion of all potential legal claims find their way into the court system. For example, a major American study found that only about 5% to 7% of all those who perceive that they have experienced a legal injury (i.e. have a grievance) end up taking their disputes to court: the vast majority of grievances are pursued and resolved through alternative means.³⁵

Public surveys cannot provide all of the answers as to how or why particular grievances move through these various stages and become "transformed" into legal disputes and law suits. They do indicate, however, that what ends up at the courtroom door is the result not only of what the law provides by way of rights and remedies, but also the kinds of injuries and disputes people experience and the choices they make about how to resolve them.

One of the consequences of viewing legal disputes as the result of individual choices is that the focus of inquiry moves away from law and legal institutions as the "creators" of legal activity and turns instead to the ways in which people make choices about "naming, claiming and blaming" in response to perceived injuries.³⁶ In part, these choices reflect the type and range of opportunities available to an individual for resolving a particular dispute. And in part they reflect an individual's "legal consciousness"; that is, the meanings and understandings an individual attaches to law and legal institutions and his or her views about the role of the formal legal system in the resolution of disputes.

A number of American sociological studies have examined the social and cultural factors which shape the choices people make in responding to an injury or resolving a dispute. These studies rely on community-based research which can look at individual decisions about legal disputing within a specific social and cultural context.³⁷ Unfortunately, there are few Canadian surveys which have attempted to measure "naming, claiming and blaming" rates among the Canadian public³⁸ and few Canadian sociological studies of how and why particular kinds of disputes end up in the courts.³⁹ Some of the discussion below relies on American studies. As noted above, the results of these studies may or may not be transferable to Ontario.

³⁵ Miller and Sarat (1980-81) is the major American study. This study analyzed data from a telephone survey of about one thousand randomly selected households in each of five federal judicial districts. Much of the discussion in this section is drawn from the empirical work of the Dispute Processing Research Project at the University of Wisconsin (Madison) Law School: Trubek et al. (1983). The conceptual framework for analyzing the way in which legal disputes are mobilized has been developed by Felstiner, Abel and Sarat (1980-81) and Galanter (1986).

³⁶ Felstiner, Abel and Sarat (1980-81: 633) suggest that the "transformation" perspective on disputes "places disputants at the center of the sociological study of law: it directs our attention to individuals as the creators of opportunities for law and legal activity: people make their own law, but they do not make it just as they please."

³⁷ Silbey (1995). See also: Mather and Yngvesson (1980-81), discussing the link between social change and legal change and attempting to formulate a general analytical framework for comparing dispute processing across cultures.

³⁸ The main Ontario study relied on in this paper is Bogart and Vidmar (1990). The only other major Canadian study was undertaken in Quebec in the mid-1970s: See Messier (1975).

³⁹ The absence of any study of legal disputing among the Canadian business community (or business communities) is a particularly significant gap in our understanding of how disputes end up in the courts, given the fact that claims by banks, corporations and institutions make up about 70-80% of all civil claims in Toronto courts: see Twohig et al (1996). There are some Canadian studies which have examined cultural variations in dispute resolution within

a. Frequency of Legal Problems

A study of the public's legal needs which was undertaken in Ontario in 1987 involved 3000 telephone interviews with randomly selected "heads of households" who were asked to report on legal problems they had experienced over the previous three year period.⁴⁰

Approximately one third of Ontario households reported one or more serious legal problems. It should be noted, however, that these are estimates of "perceived" legal problems, not estimates of the actual number of legal problems encountered by the population. Given the public's (apparently) low level of legal knowledge, it is likely that some people encountered legal problems, but did not recognize them as such.

The most frequently reported problems involved tort (personal injury), consumer problems, debt, or discrimination issues. There were some, but not very significant, differences in the number of legal problems experienced according to the demographic or socio-economic characteristics of respondents.

American studies have also found that the number of legal problems experienced is about the same across class, race, age and gender. However, there do appear to be significant differences in the type of legal problems experienced by different groups: e.g. racial minorities and the poor are much more likely than other groups to experience problems having to do with police harassment, discrimination and housing issues, while higher income and more educated groups report more consumer problems and infringements of their constitutional rights. These variations may reflect differences in the actual incidence of legal problems among different groups as well as differences in the information and cognitive resources available for the recognition of particular types of legal grievances.⁴¹

b. Frequency of Claiming

Not everyone who perceives that they have experienced a legal problem makes a claim in relation to it. A substantial proportion of those who perceive a legal injury simply take no action; that is, they deal with the problem by "lumping it".

In the Ontario study, the proportion of people claiming some kind of compensation varied with the type of legal problem being experienced: e.g. 60% of those with tort problems sought compensation; whereas only 31% of those with discrimination problems did so. Again, this is generally consistent with American studies which have found that claiming rates vary, depending on the type of legal problem being experienced. The rate of claiming by victims of discrimination has consistently been found to be lower than for any other kind of problem examined.⁴²

minority communities. See, for example, Duryea and Grundison (1993) which looked at dispute resolution processes in five racially diverse communities in British Columbia. This study was undertaken as part of the Multiculturalism and Dispute Resolution Project of the UVic Institute for Dispute Resolution, which has also published an annotated bibliography on cultural variations in different types of dispute resolution practices: Duryea (1992).

⁴⁰ Bogart and Vidmar (1990).

⁴¹ See: Curran (1977) and Silbey (1995). A summary of American research on these issues is found in Galanter (1986: 183-4).

⁴² Miller and Sarat (1984) found that about 70-75% of "middle range" grievances (i.e. over \$1000) were pursued by making a claim, although the claiming rate varied considerably depending on the type of problem. See also

Failing to make a claim is not necessarily an indication of powerlessness or a lack of confidence in law or legal institutions: it may instead indicate that the person experiencing the problem has an opportunity available to “exit” from it. For example, a study of a small American town found that low income residents were more likely than middle income residents to litigate interpersonal disputes. This does not appear to have been due to a greater propensity on the part of low income residents to claim compensation in response to an injury, or a lack of faith in the justice system on the part of those in higher income brackets; instead, it resulted from the fact that middle class residents had other alternatives available to them for dealing with these problems: e.g. moving away.⁴³

c. Choice of Disputing Strategy

Of those who perceive that they have experienced a legal problem, and decide to make some kind of claim for compensation in relation to it, only a small percentage choose formal legal action as the strategy for resolving the problem.

In many cases respondents to the Ontario study dealt with their problems through some alternative means: e.g. through self-help remedies or making a direct claim to the other party, or by going to some other forum (e.g. a government agency). The Ontario study found that the type of disputing strategy chosen varied with the type of legal problem being experienced: e.g. respondents were very likely to go to a lawyer with a family law problem, but very unlikely to do so with a discrimination problem.

Once again, it should be noted that decisions to “turn to law” are not necessarily indications of a greater faith or confidence in law and legal institutions. Decisions to use the formal legal system may instead represent an assessment that, notwithstanding its shortcomings in terms of fairness and justness, the court is more effective than the informal, unregulated arenas available.⁴⁴ American studies have found, for example, that although self-help is an accepted part of dispute resolution in interpersonal neighbourhood disputes, it is not always effective in resolving disputes. In some cases people may have no option but to take the matter to court:

When people do bring interpersonal disputes to court, they tend to be complex, intense and involutioned problems in which the moral values at stake appear sufficiently important to outweigh the condemnation of this behaviour.

... For all respondents turning to court and police with problems is a last resort to be used only if “the problems are very serious,” “can’t be avoided,” “it is absolutely necessary,” and “you have tried everything else.”⁴⁵

Some studies which have examined the relationship between the cultural practices of a particular community and use of the formal legal system by members of that community have

Kritzer, Vidmar and Bogart (1991) arguing that the extent of claiming in relation to discrimination problems may be higher than some studies have suggested.

⁴³ Baumgartner, M.P., “Law and the Middle Class: Evidence from a Suburban Town,” paper presented at the annual meeting of the Law and Society Association, Madison, Wisconsin, June, 1980, cited in Galanter (1986: 185).

⁴⁴ Silbey (1995).

⁴⁵ Merry and Silbey (1985: 151, 172-3); Galanter (1988: 26).

been prompted by the failure of both the court system and the various alternative dispute resolution processes (such as mediation) to attract members of minority cultures. One problem that has been identified is that models of dispute resolution in North America—whether the traditional adjudicatory model or a mediation/arbitration model—may be based on assumptions and values which have little or no relevance to the expectations of minority communities about how disputes should be handled:

Dispute resolution, arising as an alternative to the Western legal system, is bound by some of the same culturally-based assumptions. Some of our values, for example, revolve around our appreciation of privacy. Victor Hao Li (1987) writes:

... [I]t is nearly impossible to say 'privacy' in the Chinese language so as to convey the full English flavour of personal freedom, individuality, and a sense of being shielded from undue outside influences--all matters closely affected by law.⁴⁶

This suggests that providing effective dispute resolution services outside the courts may require a better understanding of existing dispute resolution mechanisms within different communities. Informal dispute resolution processes are highly varied and can be found in virtually all networks of social relationships: religious groups, professional associations, schools, families, and businesses. Each of these different communities has different rules about when it is appropriate to confront another person in relation to an injury (when to fight and when to compromise), different expectations about who should be consulted and listened to in relation to a conflict between two parties, and different understandings about the meaning to be attached to decisions to engage a lawyer, or take a particular dispute to court.

(iv) User Satisfaction

Public perceptions of the fairness and effectiveness of the justice system have also been assessed through surveys of people who have recently used the system to resolve a dispute (rather than the public at large.) These studies have examined variations in user satisfaction related to lawyers' services, the type of process used for resolving the dispute, and the substantive outcome of the case for the litigant.

a. Satisfaction with Lawyers' Services

The public generally has a more favourable perception of the services provided by their own lawyers than of lawyers as a general professional group.⁴⁷ Part of the explanation may be the reliance by clients on the knowledge and expertise of their own lawyers and the key role which lawyers play in dispute transformation; that is, in shaping a client's perceptions of the purpose and relevance of law and legal institutions to the resolution of the client's problem:

Of all the agents of dispute transformation lawyers are probably the most important. This is, in part, the result of the lawyer's central role as gatekeeper to legal institutions and facilitator of a wide range of personal and economic transactions.... It is obvious that lawyers play a central role in dispute decisions...

⁴⁶ Duryea (1992: 32) citing Li, Victor Hao, "A Cross-Cultural Perspective on Conflict Resolution," PCR Occasional Paper Series, 198702: Cultural Aspects of Disputing, University of Hawaii at Manoa.

⁴⁷ Moore (1985); Bogart and Vidmar (1990); Yale (1982).

.... Lawyers exercise considerable power over their clients. They maintain control over the course of litigation and discourage clients from seeking a second opinion or taking their business elsewhere. There is evidence that lawyers often shape disputes to fit their own interests rather than their clients...

... Of course, lawyers also produce transformations about which we may be more enthusiastic. They furnish information about choices and consequences unknown to clients; offer a forum for testing the reality of the client's perspective, help clients identify, explore, organize, and negotiate their problems; and give emotional and social support to clients who are unsure of themselves or their objectives.⁴⁸

A survey conducted in Ontario in the late 1970s found that where clients do make complaints about their own lawyers, these are most likely to be related to the lawyer's failure to explain and report on their cases and the length of time the case took to complete. In addition, a majority of clients appear to believe that their lawyers' fees are too high.⁴⁹

An American study of tort litigants found that litigants generally gave favourable evaluations of their attorneys, but that evaluations varied with the type of dispute resolution process being used: attorneys were given more negative evaluations for their performances in settlement conferences than they were for their trial work.⁵⁰ These variations may reflect variations in the perceived quality of attorney work under different processes, or they may simply reflect the fact that litigants are generally more satisfied with some kinds of dispute resolution processes than they are with others.

b. Satisfaction with Decision-Making Processes

A number of studies have attempted to measure whether litigants are more or less satisfied with the justice system depending on whether their legal claim is adjudicated or resolved through an alternative means, in particular through mediation or settlement. Different dispute resolution processes are often assumed to offer different advantages and disadvantages in terms of procedural fairness, cost, delay and outcome.⁵¹

– Adjudication vs. Mediation

The results of survey research on these issues suggests that the most significant factor in predicting public satisfaction with the legal process is not whether the process is called "adjudication" or "mediation", but whether the process is seen as fair and as providing an opportunity for the parties to "tell their stories." This appears to be very important in the

⁴⁸ Felstiner, Abel and Sarat (1980-81: 645-6, references omitted.) These observations are supported by the focus group interviews which were conducted as part of the 1987 study of the public's legal needs in Ontario: Bogart and Vidmar (1990).

⁴⁹ Yale (1982: 52-4) citing a 1977 survey of Ontario clients conducted by the Professional Organizations Committee and a 1978 Canadian Gallup Poll. This study found similar concerns expressed by clients in Britain, Australia and the United States.

⁵⁰ Lind (1989: 71).

⁵¹ On the difficulty of measuring and comparing these differences, see Esser (1988-89).

litigation of small claims court matters.⁵² However, the perceived fairness of the process, the dignity of the proceedings, and litigant perceptions that they are being kept informed also appear to be key determinants of litigant satisfaction in other cases as well.⁵³

The Rand Corporation's Institute for Civil Justice conducted a study in 1989 of litigants involved in tort cases and found that:

Impressions of the litigation process were the most powerful determinants of procedural fairness judgments and satisfaction with the court, and judgments of dignity, procedural care, and procedural bias were among the most powerful of these impressions in their effects. Litigants want procedures with which they can feel comfortable, but this does not mean they want less formal procedures-- informality does not make litigants either more or less comfortable.⁵⁴

A recent evaluation of the ADR Centre in Toronto came to somewhat similar conclusions. Although a majority of clients were very positive about the ADR Centre, and about the mediation process, levels of satisfaction did not appear significantly higher than among clients in the control group (whose cases went to trial.) Again, the key determinants of satisfaction among ADR clients were whether they perceived the process to be "fair", whether they understood what was going on and whether they felt like a participant in the process.⁵⁵

– Litigation vs. Settlement

Survey results also suggest that it should not be assumed that cases which settle produce more satisfaction than cases resolved through litigation.⁵⁶ Settlement, in and of itself, may not tell us anything about whether a case has been resolved to the satisfaction of both parties or to their mutual benefit:

⁵² There is some debate in the literature about whether adjudication or mediation is better at providing these qualities in the resolution of small claims court disputes. See: Vidmar (1985) which found no relationship between satisfaction and whether the case was adjudicated or settled: satisfaction depended largely on whether the hearing was perceived as fair; McEwen and Maiman (1984) which found more satisfaction among mediated cases than among adjudicated cases, and O'Barr and Conley (1985) concluding that satisfaction in small claims court cases was directly related to whether people had the chance to "tell their stories".

⁵³ The importance of process is discussed in T. Tyler, *Why People Obey the Law*, New Haven, Yale University Press, 1990.

⁵⁴ Lind (1989: 75).

⁵⁵ See Macfarlane (1995). U.S. studies have also found that the perceived fairness of the ADR process is key to client satisfaction. See: Rosenberg and Folberg (1994) which found that 2/3 of respondents were satisfied with the ADR process. A key predictor of participant satisfaction was the skill of individual evaluators; i.e. whether they facilitated communication, understood the legal issues, listened carefully etc. At the same time, satisfaction with ADR may vary widely depending on the particular type of mediation offered to clients. See: Merry (1990) comparing the high end ADR offered to wealthy litigants (mini-trial with a judge) with low end ADR generally available to the poor ("basement mediation").

⁵⁶ See, for example, Caplovitz, David, *Consumers in Trouble: A Study of Debtors in Default* finding that of 314 debtors only 53% considered settlement "fair". Conrad, et al, *Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation* (1964), which found that of 226 claimants, 66% of those with serious injuries thought the settlement was inadequate: cited in Galanter and Cahill (1994).

It is often asserted that parties are more satisfied with settlements than with adjudicated outcomes. This is plausible insofar as one associates settlement with greater party participation and control, the possibility of individualizing outcomes to suit the needs of the parties, and so forth. But even so, significant numbers of those who settle are not very happy with the outcome.

... the mere occurrence of settlement (or trial) does not establish that the parties prefer the process or that they regard the outcome as optimal. The choice of settlement or trial is a choice in a context of limited knowledge, strategic exigency, and a limited range of perceived alternatives. This is especially so for unsophisticated, "one shot" parties. These limitations should caution us against equating party choice to settle or to litigate with an informed affirmation of the quality of the selected process.⁵⁷

The American study of tort litigants referred to above found that respondents who had their disputes resolved through arbitrations or trials thought that these procedures were fairer than litigants whose cases had been resolved through settlement conferences:

The perceived fairness advantage of arbitration and trial over settlement conferences seems to be due to litigants' perceptions that arbitration and trial procedures are more dignified and that they employ a more careful and thorough process.⁵⁸

The findings from this research do not support the conclusion that a formal legal trial, within a full-blown adversarial system, is the only means of providing people with a dispute resolution process with which they will be satisfied: arbitrations fared almost as well as trials in terms of litigant satisfaction with the process. This research also only speaks to satisfaction with different types of dispute resolution processes at a particular point in time and in relation to a particular type of legal problem; specifically, at the point of a trial, arbitration or a judicial settlement conference aimed at resolving a tort claim. Satisfaction with settlement, or with the other processes, may be quite different if attempted at an earlier stage of the dispute (i.e. before positions and attitudes have had a chance to "harden") or if applied to different types of legal problems (e.g. business disputes or consumer complaints.)

– Cost and Delay

As noted above, cost and delay appear to be two of the most frequently cited complaints about the provision of lawyers' services. Further, a large proportion of respondents to public surveys indicate that the anticipated cost and delay in launching a law suit would likely dissuade them from doing so.⁵⁹

We have little empirical evidence about the impact of cost and delay on litigants' satisfaction with the legal system. However, one would expect that long and expensive trials would dampen the enthusiasm of litigants for the adversarial process. Somewhat surprisingly, the existing evidence does not confirm this assumption, at least in some kinds of cases. The researchers who conducted the study of American tort litigants found little correlation between cost and delay on the one hand and litigant satisfaction with the process on the other: litigant

⁵⁷ Galanter and Cahill (1994: 1353, 1358-9).

⁵⁸ Lind (1989: 45).

⁵⁹ See above, footnote 40.

satisfaction was not directly influenced by cost or delay, so long as the process was perceived to be fair:

... the study suggests that care must be taken to ensure that innovations that reduce cost and delay do not do so at the expense of those qualities of the judicial process that are more important to litigants. If more rapid or less expensive procedures accomplish cost and time savings at the expense of apparent dignity, carefulness, or lack of bias, they may constitute a poor bargain in the eyes of litigants.⁶⁰

This is not an argument in favour of ignoring the problems of cost and delay in the legal process. These problems may play a very important role in determining public perceptions of the legal system in the pre-litigation stage and can have serious consequences for the efficient functioning of the courts. However, these findings do suggest that dispute resolution processes aimed at reducing cost and delay will be less satisfactory to litigants if they trade off procedural fairness in order to achieve faster and less expensive dispute resolution.

c. Satisfaction with the Outcome

Apart from the nature of the dispute resolution process, the cost of the process, and the time it takes to get the dispute resolved, one would expect that user satisfaction would be heavily influenced by the outcome of the case: i.e. whether the litigant won or lost, and by how much.

Public survey results suggest that the type of legal problem being experienced affects a plaintiff's chance of "winning" or "losing" and his or her satisfaction with the process and the outcome:

... outcome and satisfaction vary widely, depending on the type of problem, and, not surprisingly, how well people did is closely connected to how satisfied they are. For example, individuals with tort claims... tended to be most successful: 88% got all or most of the claim. These individuals are also the most satisfied: 80% are very or somewhat satisfied, and they are very unlikely to complain that the process was too long (19%) or too costly (16%).

By contrast, only 21% of people with professional service problems obtained all of what they claimed, and fully 50% received nothing. In terms of satisfaction, only 14% described themselves as very satisfied... A similar scenario develops (sic) in terms of those with discrimination problems.⁶¹

Because different types of legal problems use different types of dispute resolution processes, we do not know from these surveys how much of the satisfaction associated with different types of cases had to do with "winning" and how much had to do with the dispute resolution process.

It does appear, however, that the relationship between outcome and satisfaction is not straightforward in the sense that the more a litigant wins, the more satisfied he or she is. The American study of tort litigants described above found that the amount won or lost did matter to litigant satisfaction, but only to the extent that it exceeded, or fell short of, what litigants were expecting. In other words, what seems to matter is not the absolute amount won or lost,

⁶⁰ Lind (1989: 78).

⁶¹ Bogart and Vidmar (1990: 25).

but whether litigants got more or less than what they had expected: winning or losing appears to be a subjective, not objective, experience.⁶²

(d) SUMMARY

Existing survey research indicates that the public has a low level of concern and knowledge about the civil justice system. The public does not seem to view the workings of the civil justice system as a priority issue and does not appear to have much awareness or knowledge of how the system works.

Public surveys which have examined attitudes to the civil justice system have found that the Canadian public is generally supportive of law and legal institutions, but somewhat sceptical of the fairness and effectiveness of the current justice system. There appears to be a strong and persistent belief among the public that the law and the legal system can be manipulated by the rich and the powerful and that the system (and its lawyers) are slow, costly and difficult to understand.

There do appear to be some variations among different socio-economic groups in the extent to which respondents are supportive of law and legal institutions: women, younger people, aboriginal persons and those who are less wealthy and less well educated seem to have less confidence than others and be less willing to assume that the legal system represents all values and interests fairly. In addition, the degree of confidence in the fairness and effectiveness of the system seems to vary with the type of legal problem being experienced: people experiencing family law problems, for example, appear to be more critical than others of the way the system operates.

Surveys of the public's legal needs have found that only a small proportion of all legal problems find their way into the formal legal system. There appear to be wide differences in the extent to which the legal system is seen as a viable method of dispute resolution depending on the type of problem an individual is experiencing and the opportunities available to him or her for resolving the problem by another means.

Public surveys suggest that perceptions of the civil justice system appear to change somewhat when people who have used the system are asked for their views about their own cases. For one thing, perceptions of lawyers improve, at least insofar as one's own lawyer is concerned. The key to user satisfaction with the system, however, appears to be whether or not the decision-making process is perceived as fair; and litigants seem to have a fairly strong sense of what constitutes procedural fairness. Being heard, and having one's case taken seriously, appear to be more important determinants of user satisfaction than whether the decision is reached through a trial, an arbitration or mediation. Procedural fairness also appears to be more important than getting a fast or inexpensive decision, or simply reaching a settlement. Winning matters to user satisfaction; but winning and losing appear to be highly subjective events in this context. What seems to matter most is not the amount won or lost but whether the outcome meets the litigant's expectations.

Ethnographic studies which have examined attitudes to the justice system in depth have come up with a far more complex set of public attitudes to the law and legal institutions than can be captured by survey results. American sociological studies have demonstrated the ways in which cultural context and social constraints shape an individual's perceptions of injuries,

⁶² Lind (1989: 59).

decisions to make a claim, and strategies for resolving problems. These studies have found that a decision to “turn to law” may not reflect an individual’s confidence in the fairness of the law or in legal institutions so much as his or her lack of other (private) alternatives for resolving a problem.

At the same time, qualitative studies have found that public attitudes to the justice system appear to be both unstable and contingent: law and legal institutions may be accepted at some times and for some purposes, but not at other times and for other purposes. In addition, there appear to be wide variations in cultural practices among different communities and diverse views about the role of the formal legal system (and other dispute resolution practices such as mediation) in resolving disputes. In short, these studies suggest caution in drawing any easy conclusions about how “the public” perceives the justice system: attitudes to conflict and legal authority are highly varied, strongly influenced by social and cultural forces, and subject to change.

3. CIVIL JUSTICE REVIEW CONSULTATIONS

This part of the paper examines the perceptions of the bench, the bar and a number of public interest groups who were consulted during the course of the Civil Justice Review.

(a) PERCEPTIONS OF THE BAR AND THE BENCH

The Civil Justice Review has members from the government, the judiciary, the bar and the public. It is co-chaired by a government representative and a representative from the judiciary. The Review consulted broadly with the bench and bar in the course of preparing its First Report and its recommendations reflect the views of many court administrators, judges, and lawyers about the state of the civil justice system in Ontario.⁶³

(i) The Issues to be Addressed

The Terms of Reference of the Civil Justice Review state that cost, delay, inefficiency and inaccessibility are the problems to be addressed through the Review. The perception that these are the fundamental problems with the civil justice system is consistent with views expressed by the bar and the bench in other jurisdictions.⁶⁴ As Lord Woolf said in his recent report on civil justice reform in England:

Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable

⁶³ This is not to suggest, of course, that all members of the bench and bar agree with all aspects of the Civil Justice Review’s approach to the issues. However, the Review did manage to achieve a measure of consensus among these groups on a range of issues.

⁶⁴ To a greater or lesser extent, all of the recent civil justice reform projects have been supplemented by opinion surveys which provide quantitative measures of how participants in the civil justice system view the system and what solutions they believe would work best to reform it. For example, the Brookings Institution Task Force on civil justice reform in the United States relied in part on the results of a 1988 Louis Harris and Associates Poll of more than a thousand participants in the civil justice system-- private litigators, corporate counsel, judges, public interest litigators.

disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.⁶⁵

The Brookings Institution Report, *Justice For All*, expressed the same kinds of concerns about the civil justice system in the United States:

... increasingly, all who participate in the judicial system-- litigants, judges, and attorneys-- are voicing complaints about its inefficiency and lack of fairness. In many courts, litigants must wait for years to resolve their disputes. In the meantime, their attorneys pursue ever more expensive means of discovery to prepare for trial, often having to duplicate their preparation when trial dates are postponed. Among the bulk of cases that are never tried but settled, many are overprepared and overdiscovered. In short, civil litigation costs too much and takes too long.⁶⁶

Similarly, the Access to Justice Advisory Committee in Australia was appointed, at least in part, with these concerns in mind: its Terms of Reference indicate that part of its task is to make recommendations for a "fairer, simpler and more affordable" justice system.⁶⁷

(ii) Urgency of the Issues

From the point of view of those responsible for processing civil cases through the system, the seemingly ever-increasing volume of cases has created delay and backlog problems which are now reaching crisis proportions and threatening the due administration of justice:

No civilized society can remain stable without a mechanism whereby its members can resolve their disputes peacefully and, where necessary, in a binding fashion. The alternative to such a mechanism is chaos at best, and unbridled violence at worst.

Unreasonable delay in the disposition of disputes is, indeed, "*the enemy of justice and peace* in the community". It leads inevitably to unreasonable costs. It breeds inaccessibility. It fosters frustration, and frustrates fairness. The administration of justice falls into disrepute.

... These developments pose serious threats to the civil justice system which, simply put, is in a crisis situation.⁶⁸

Lord Woolf's Report on the civil justice system in England offers a similar perspective on the threat to the rule of law created by the current crisis within the civil justice system:

⁶⁵ Woolf (1995).

⁶⁶ Brookings Institution, (1989: 1). For an alternative perspective on the issues-- harking back to the "access to justice" concerns of the 1970s and 80s see: Legal Action Group (1995: 3). In this alternative perspective, the issues are not cost, complexity and delay, but "ost (including delay); deficiencies in the capacity of some prospective parties (including lack of financial resources, knowledge and relative experience--identified as the imbalance between 'one shot' litigants and 'repeat player') and the particular problems of 'diffuse interests', collective or fragmented interests, such as those in clean air or consumer protection."

⁶⁷ Access to Justice Advisory Committee (1994: xxix). The Australian Committee's Terms of Reference are much broader than those of the Civil Justice Review and its focus is, to a much greater degree, on issues having to do with equality before the law and equal access to justice.

⁶⁸ Civil Justice Review (1995: 2-3).

Effective access to the enforcement of rights and the delivery of remedies depends on an accessible and effective system of civil litigation. Lord Diplock drew attention to the constitutional role of our system of civil justice and the constitutional right which individuals have to obtain access to it in *Bremer v. South India Shipping Corporation Ltd.* (1981) A.C. 909, 917, when he said:

Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which *every citizen has a constitutional right of access* in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant”.⁶⁹

Similar views about the urgency of the issues have been expressed by the federal judiciary in the United States:

Should the Congress and the nation not heed these concerns about the implications of uncontrolled growth, fears are increasing that one of two unfortunate consequences will inevitably follow: an enormous federal court system that has lost its special nature or, because of budgetary constraints, a larger system incapable, due to workload and shortage of resources, of dispensing justice swiftly, inexpensively and fairly.⁷⁰

Finally, the Advisory Committee on Access to Justice in Australia was also established as a result of what the Minister of Justice described as “crisis of confidence in the institutions fundamental to the rule of law in a democratic society.”⁷¹

(iii) Causes of Problems and Recommendations for Reform

In searching for causes for the problems of cost, complexity and delay, the Civil Justice Review’s First Report identified sources both within and outside the system.

a. Internal Problems

Court administrators and judges who work within the system on a daily basis are in some respects uniquely situated to identify the process issues which contribute to the problems of cost, delay and complexity in the civil justice system. Many of the reforms recommended by the Civil Justice Review address issues having to do with the system’s procedural rules, administration and internal management.

b. External Influences

At the same time, the Civil Justice Review acknowledges that attention to procedural and administrative inefficiencies are unlikely to resolve all of the problems in the civil justice system. Regardless of how efficiently the civil justice system is managed from within,

⁶⁹ Woolf (1995: 2).

⁷⁰ Committee on Long Range Planning of the Judicial Conference of the United States (1994: 11).

⁷¹ Access to Justice Advisory Committee (1994: xxix). The British, Canadian and Australian reports have stressed the potential impact of the civil justice crisis on the rule of law, peace and order in the community, and the due administration of justice. The American reports, on the other hand, have primarily emphasized cost and efficiency concerns and the costs to American business of “excessive” litigation.

problems related to backlog and delay will continue to occur if the volume of civil cases continues to rise. Court administrators and judges are at the end-point of public decisions to litigate. They have no means of directly influencing the volume of civil caseloads because this is the collective result of thousands of individual decisions made by people outside the system. It is understandable, therefore, that causes for the perceived increase in civil caseloads should also be sought outside the system itself, in factors which are perceived to promoting litigation:

... There is more civil litigation. It is more complex. It takes longer to prepare, to settle and to try. It is fostered by an increasingly "rights-oriented" and litigious society; enhanced in the prism of mass media coverage; and nurtured by a continuing onslaught of legislation from all levels of government giving people more and more opportunities to go to court.⁷²

As noted above, the process by which injuries become disputes and disputes become law suits is highly complex and the extent to which any general cultural changes have promoted or discouraged litigation is a contentious issue about which we have little empirical evidence.

(b) PUBLIC PERCEPTIONS

(i) Public Consultations for the First Report

In carrying out its work for the First Report, the Civil Justice Review solicited the views of the public through a number of means, including a public survey⁷³ and a series of public consultations and meetings.⁷⁴

The Review concluded that the public believes the civil justice system is "out of control" and the First Report provides a long list of problems with the system which were identified by the public during the consultations, including accessibility, cost, waste, delay and complexity.⁷⁵ The Report summarizes the views and concerns of the public in the following terms:

⁷² Civil Justice Review (1995: 3). Similar concerns have been expressed in other jurisdictions. As the following quote from a former Chief Justice of United States Supreme Court indicates, the perceived shift to litigation has been seen by some as the result of a decline of a number of socially integrative institutions:

... one reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that were once considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements'. The courts have been expected to fill the void created by the decline of church, family and neighbourhood unity: Burger (1983).

⁷³ The Civil Justice Review did not provide a statistical analysis of the results of its public survey. However, it did refer in its First Report to other studies which have been conducted of public perceptions of the civil justice system.

⁷⁴ The public meetings were publicized and open to all, but some caution must be exercised in drawing conclusions about the representativeness of the views expressed at these meetings. Members of the public who are indifferent or content about the state of the civil justice system were not likely to show up for the meetings.

⁷⁵ Some studies have found a sharp difference between the views of the public, on the one hand, and the bar and the bench, on the other: National Center for State Courts, *The Public Image of Courts*, 1978, Williamsburg, Virginia, cited in Gibson (1985: 18). However, the Civil Justice Review's First Report found a great deal of consistency between the views expressed by the public and those of the bench and bar in terms of the problems confronting the civil justice system.

In general, the members of the public were frustrated and sometimes angry with the court system. Their growing disrespect was apparent. They wanted more information in clear, plain language about the process; and they wanted a more simplified process itself, with less cost and fewer delays. They want to see the mystifying complexity of the courts eliminated and they wanted to participate in a meaningful way in the decision-making processes that would accomplish these goals.⁷⁶

To some extent these views echo the views expressed by the public in other studies of public perceptions of the justice system. As noted above, public survey results suggest that the public views the civil justice system as remote, slow, costly and complex. However, the public's views of the system may be somewhat more complex and ambiguous than the public consultation process revealed: e.g. there is evidence to suggest that some socio-economic and demographic groups have more confidence in the justness and fairness of the system than others, that public attitudes toward, use of and satisfaction with the system are different within different communities and in relation to different types of legal problems, and that those who use the system may or may not be satisfied with it depending on whether they perceive the process as fair and whether what they end up getting is more or less than what they expected.

(ii) Fundamental Issues Group Consultations

The Fundamental Issues Group of the Civil Justice Review conducted a series of consultations with representatives of a range of interest groups: business groups, ADR providers, anti-poverty groups and groups representing women, racial minorities, francophones, aboriginal people and disabled persons. Participants were asked to take part in roundtable discussions and respond to a series of questions regarding problems with the current civil justice system, and possible ways of reforming it. (A summary of the groups consulted is included in the Appendix.)

The results of these consultations cannot be quantified in any meaningful sense and there is some question of the representativeness of those who participated.⁷⁷ However, they do provide an alternative means of assessing public perceptions and it is possible to distil from the discussions a general sense of how particular members of the public perceive the civil justice system and the ways in which it serves, or fails to serve, their interests.

For purposes of this paper, the results of these consultations are presented in three general categories: business groups, disadvantaged and minority groups (i.e. the poor, women, disabled people, francophones and racial minorities) and ADR providers.

a. Business Groups

As noted above, we know surprisingly little about business disputing, or about how business views the justice system.⁷⁸ This is an important knowledge gap given the important

⁷⁶ Civil Justice Review (1995: 6,87).

⁷⁷ That is, we cannot know how well those who attended the meetings reflected the views and concerns of those they were there to represent. Further, not all groups invited to these meetings were able to send representatives and some groups were better represented at meetings than others.

⁷⁸ Galanter and Rogers (1991).

role that business plays in shaping the types and volumes of cases which end up in the civil courts.

Business groups did express some significant concerns about cost and delay in the civil justice system, particularly in relation to the complex procedures and antiquated technologies being used to process cases. In addition, a number of issue-specific problems were raised: e.g. the difficulty and cost of the system in relation to the processing of 'slip and fall' claims against small businesses and the time taken to process high volume residential landlord and tenant cases where there is often no real legal issue to be determined. However, on the basis of the Fundamental Issues Group consultations it would be fair to conclude that business groups in Ontario do not share with the bench and bar the same sense of "crisis" in relation to the civil justice system. Most business groups did not exhibit profound dissatisfaction with the civil justice system and expressed an appreciation for the certainty, formality and neutrality of the court system and its enforcement mechanisms. Small business was particularly satisfied with the current small claims court process.

In addition, business groups did not appear to favour the removal of any particular categories of cases from the court system: they expressed the view that access to the courts for the purposes of resolving disputes was an important right which should be funded by the government and available to everyone on an equal basis, with cost recovery through the imposition of fees.

At the same time, from a business perspective, litigation is clearly viewed as only one possible response to a legal problem. Businesses appear to use a number of different strategies for dealing with legal problems, depending on the type of problem. For example, in some cases doing nothing may be a rational response (e.g. in relation to bad cheques and other consumer debt where the amount in issue does not justify the cost of taking legal action). In other cases, it makes sense for businesses to establish their own dispute resolution processes (e.g. setting up consumer complaint departments which help to maintain good customer relations).

Representatives from the construction industry thought alternative dispute resolution processes had potential as a means of providing better, faster and cheaper justice for the resolution of highly technical construction disputes. Similarly, the insurance industry favoured the continued use of specialized adjudicators-- outside the court system--to deal with auto insurance claims. However, other business representatives were more sceptical of the ability of ADR to provide better or faster justice. In particular, concerns were expressed about the uncertainty of the result where ADR is used, since decisions in these cases are not binding on other cases and are not published. To some extent, ADR was seen as a riskier proposition than the courts.

Landlord representatives at the meeting did not favour mediation of landlord and tenant disputes primarily because they felt that there was no issue to mediate: most cases were simple consumer debt matters in relation to which there was no valid defence (i.e. applications for possession resulting from unpaid rent.) Instead, landlord representatives favoured more summary procedures to permit faster processing of these cases.

Finally, there was little enthusiasm for any kind of "across the board" solution to the problems of cost, complexity and delay in the civil justice system, through wide-scale adoption of ADR mechanisms, fundamental reforms to civil procedures or greater reliance on administrative processes for resolving disputes. Business representatives appeared convinced that problems were highly varied and solutions had to be adopted which were appropriate in

particular contexts. In addition, business representatives were of the view that ‘business’ did not represent a single, coherent group likely to respond in a uniform way to any general reform proposal: the needs, concerns, means and perspectives of businesses were highly varied.

b. Disadvantaged and Minority Groups

Consultations with groups representing anti-poverty advocates (including legal clinics), women, disabled persons, francophones, aboriginal people and racial minorities all focused primarily on access to justice issues.

The particular concerns of different groups varied widely:

- Representatives of racial minorities expressed strong concerns about bias in the system and a “crisis of confidence” in the fairness of the legal process in terms of its treatment of racial minorities.
- Representatives of disabled persons, on the other hand, expressed profound dissatisfaction with the continuing lack of full physical access to the court (inaccessible court houses, the absence of interpreters)
- Women’s representatives were concerned about the ways in which the substantive rules of the civil law worked in various ways to “privatize” the concerns of women, relegating them to the status of “non-legal” issues and therefore not to be taken into account in deciding cases
- Representatives of aboriginal people were concerned about access to courts and other justice services in the remote north, language barriers, and (more generally) with an adversarial (document-based) justice system being inappropriately imposed on aboriginal communities
- Representatives of francophone organizations expressed concern about the continuing lack of court services and documents available in French
- Anti-poverty advocates expressed concerns about the status and quality of “poor people’s justice”; i.e. about the inaccessibility of the formal legal system due to its cost and the tendency to provide low quality, ineffective alternatives through administrative agencies (e.g. the very slow and uncertain resolution of human rights cases by the Human Rights Commission). Concerns were also expressed about the lack of judicial knowledge about the legal problems of the poor.

As in the case of business groups, representatives of disadvantaged groups identified the strengths of the formal legal system in terms of its predictability, procedural rigour and the enforceability of its decisions. The formal nature of court proceedings was seen as neither a strength nor a weakness compared to administrative hearings (both were likely to be alienating to clients.) However, due to the existence of court houses throughout the province, geographical access to the system was seen as another strength of the courts. (However, as noted above, this physical access is non-existent for many disabled persons and aboriginal communities living in the remote north.)

The ability of the courts to make binding decisions was considered very important in terms of avoiding the “relitigation” of issues, which often occurred before administrative tribunals and could be very expensive and time-consuming when large numbers of clients are affected by an administrative decision. Most advocates who represent disadvantaged individuals appear

to undertake litigation selectively and strategically and to pursue matters in the courts only in relation to systemic questions affecting large numbers of clients.

It was also clear from these consultations that representatives of disadvantaged persons employ a wide range of alternative strategies for dealing with legal problems encountered by their clients. As in the case of business groups, use of the legal system is clearly only one potential response to a legal problem. And, again, alternative strategies used to deal with problems are highly varied. Going to a government agency is one common way to deal with a problem. In many cases, representatives of disadvantaged individuals negotiate solutions to solve problems, rather than turning to litigation to enforce their clients legal rights. This is particularly likely to occur where the problem is urgent and potentially life-threatening: in these situations, the overriding concern is not the vindication of rights but finding a quick and effective solution to the problem (e.g. access to care for the elderly, restoration of social assistance benefits.) In some of these cases, litigation might be a preferable option in terms of what the individual client might obtain if the case were litigated and also in terms of establishing a precedent which could be followed in other cases. However, the urgency of the issues to the individual, or the cost of litigating, often precludes the possibility of going to court.

Many of the representatives at these meetings emphasized the difficulties which their clients had in finding effective non-legal solutions to their problems on their own. For example, disabled persons who complain to a manager or person in authority about a lack of access to a building may find themselves being treated as "trouble makers". Others may also lack the confidence to approach large institutions or corporations who are responsible for the infringement of legal rights. People with literacy and learning problems have unique and acute problems in gaining access to both formal and informal systems of dispute resolution due to their inability to communicate effectively. In the absence of an effective advocate, many disadvantaged persons have no effective means of resolving their legal problems either within or outside the formal legal system.

In some contexts, and for some issues, there was support for alternative dispute resolution mechanisms (e.g. in smaller communities where there is a need to maintain a relationship between the client and the provider of an essential service, such as housing.) However, there was also a great deal of concern expressed about the potential impact of ADR processes where the parties were not equivalent in terms of bargaining power (e.g. in family law matters, or disputes which pit a disabled individual against a large institution.)

Many First Nation communities have established processes which could be called "alternative dispute resolution". These processes involve the whole community and are aimed at resolving issues and conflicts in a manner that will preserve (or restore) peace and harmony within the community. It was suggested that community councils, which were originally established to deal with native people diverted from the criminal justice system, could expand their mandate to deal with some kinds of civil disputes: e.g. landlord and tenant matters and some family disputes. However, the absence of stable funding for such initiatives is a major stumbling block.

Finally, most disadvantaged and minority groups represented at these meetings shared with the business groups a lack of enthusiasm for "across the board" solutions to the problems of cost, delay and complexity in the justice system and a suspicion of any suggestion that particular categories of cases should be removed from the court system. Not only was there a concern that any such solutions would fail to take into account the need for different kinds of

solutions to different kinds of legal problems; there was also a concern that, at the end of the day, fundamental reform of the justice system would further narrow access to justice for disadvantaged persons.

c. ADR Providers

Providers of mediation and arbitration services who attended the discussions were frank about their belief that these forms of dispute resolution could in many cases provide a cheaper and faster way of resolving disputes than the traditional legal system. However, ADR providers did not take the position that ADR could provide a substitute for the courts. Instead, there was a general consensus that ADR was right for some kinds of cases and litigation was right for others. The issue was how to establish the appropriate kinds of “screens” to ensure that disputes get sent to the right forum for resolution.

A number of suggestions were put forward as to how disputes appropriate for ADR could be identified. The following characteristics were suggested as possible indicators that a particular dispute should go into the ADR stream, rather than the court/litigation stream:

- disputes where there is no real legal issue to resolve: instead, the complaining party is simply seeking an acknowledgement of the wrong from the other party
- disputes which are highly technical or complex and therefore require resolution by an expert decision-maker familiar with the field
- disputes where there is an on-going relationship between the parties which could be damaged by an adversarial contest in the courts
- disputes where a quick and cheap decision is required.

Some ADR providers perceived ADR as providing a new, middle option for resolving disputes; that is, another choice to the traditional two of either “lumping it” or going to court. Others, however, pointed out that our knowledge about how people actually deal with disputes is very limited and that we need more empirical research about how, in the real world, people get their disputes resolved.

ADR providers who participated in the consultations identified the following issues as the most important ones facing the still-fledgling ADR industry:

- How should quality control of ADR services be ensured?
- How (if at all) should ADR services be regulated?
- What are the costs of ADR vs. litigation?
- Who should pay for ADR services; i.e. should the costs be borne privately, or should they be publicly subsidized (in whole or part) in the same manner as court services?
- Are there circumstances where ADR should be mandatory, or a precondition to filing a law suit?
- Should ADR decisions be reviewable by the courts?
- Should ADR services be part of the court process or offered separately through the private market?

The participants in the consultation did not offer answers to all of these questions, but it was clear that ADR providers, through their own formal and informal networks, are currently debating these issues.

(iii) Summary

Based on the Civil Justice Review's First Report, the bench, the bar, and court administrators all share the view that the civil justice system is slow, costly, paper-driven and near the crisis point as a result of ever-growing caseloads and backlogs of civil cases.

Not surprisingly, the primary concern of many internal participants is how the system can be made more efficient and effective; i.e. how cases can be diverted from the system to ADR mechanisms, how lawyers and their clients can be persuaded to resolve disputes through non-adversarial means, how the amount of paper can be reduced, and how cases can be managed from within more effectively. In short, civil justice system "insiders" appear to be seeking a system that is smaller, faster, and more efficient.

The consultations undertaken by the Fundamental Issues Group, on the other hand, revealed a somewhat different perspective on the part of those "outside" the system. All of the interest groups consulted appeared to perceive the civil justice system as only one means of resolving a problem or dispute. The civil justice system was generally seen as existing alongside a number of other, private means of resolving disputes. Decisions to litigate appear to depend in part on the type of problem at hand. Further, although the civil justice system was perceived primarily as a "last resort" solution, it was also perceived as having some unique strengths, compared to private dispute resolution mechanisms; in particular, the court's rigorous procedural rules and its power to issue authoritative rulings which could serve as a precedent for resolving future disputes were seen as significant and valuable.

Most of the participants in the Fundamental Issues Group consultations expressed some concerns about the cost and delay involved in civil litigation, but they also expressed concerns about the public's lack of access to the system as a result of other factors: e.g. language, disability and geographical location. Further, throughout these consultations the emphasis was not so much on a smaller, faster, more efficient civil justice system, but on finding more effective ways of resolving specific problems either within or outside the court system; e.g. by changing business practices to minimize consumer disputes or altering substantive legal rights to eliminate the relitigation of issues. There was little in these consultations to support the view that the public is more "litigious" than it once was, or that there is public resistance to non-adversarial forms of dispute resolution.

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APPENDIX

Fundamental Issues Group Roundtable Discussions: Individuals and Groups Consulted

Anti-Poverty Representatives

Ian Anderson, Scott & Ayles
Bruce Porter, Centre for Equality Rights in Accommodation
Michael Foster, Community Legal Services, Niagara South
Kenn Hale, Federation of Metro Tenants Association
Pat Ludu, Metro Tenants Legal Services
Jack Fleming, Legal Clinics Housing Issues Committee
Joanne Boulding, Muskoka Legal Clinic
Ruth Carey, Northumberland Community Legal Centre
Julia McNally, Neighbourhood Legal Services
Catherine Bickley, Pay Equity and Advocacy Legal Services

Business/Consumer Representatives

David Phillips, Canadian Bankers' Association
Judith Andrew, Canadian Federation of Independent Business
Celia Hitch, Canadian Institute of Public Real Estate Companies
Tom Delaney, Consumers Association of Canada
John M. Dean, Board of Trade of Metropolitan Toronto
David Frame, Council of Ontario Construction Associations
Peter Goldthorpe, Council of Ontario Construction Associations
Ian Howcroft, Canadian Manufacturers' Association
Ward Campbell, Ontario Homebuilders' Association
Randy Bundus, Insurance Bureau of Canada
Peter Woolford, Retail Council of Canada
Deborah Fine, Fair Rental Policy Organization of Ontario
Catherine Kerr, Fair Rental Policy Organization of Ontario
Judy Goldring, Fair Rental Policy Organization of Ontario

ADR Representatives

Murray Miskin, Arbitration and Mediation Institute of Ontario
Kathleen Kelly, Canadian Bar Association, ADR Section
Allan Stitt, Canadian Bar Association, ADR Section
Dean Peachey, The Network: Interaction for Conflict Resolution
Genevieve Chorneki, Society of Professionals in Dispute Resolution
Lorraine Martin, Family Mediation Canada
Connie Renshaw, Ontario Association of Family Mediators

Women's Representatives

Sharon Greene, Barbara Schlifer Commemorative Clinic
 Rosalind Cairncross, Ontario Advisory Council on Women's Issues
 Eileen Morrow, Ontario Association of Interval and Transition Homes
 Leslie Pearl, Ontario Women's Directorate

Minority Group Representatives

Davies Bagambiire, African Canadian Legal Clinic
 Avvy Go, Metro Toronto Chinese and Southeast Asian Legal Clinic
 Visumzu Msi, Delos Davis Law Guild

Disabled Persons Representatives

Pat Hat, Ontario Advisory Council on Disabled Persons
 Anne Molloy, Advocacy Centre for the Handicapped
 Judith Wahl, Advocacy Centre for the Elderly
 George Mayor, Paul Bellair, Canadian Institute for the Blind
 David Lepofsky, Crown Law Office, Criminal, Ministry of the Attorney General

Francophone Representatives

Association canadienne française de l'Ontario
 Association interculturelle franco-ontarienne
 Federation des caisses populaires de l'Ontario
 Federation des femmes canadiennes françaises de l'Ontario
 Association des juristes d'expression française de l'Ontario
 Clinique juridique Stormont, Dundas & Glengarry
 Clinique juridique populaire de Prescott et Russell

Aboriginal Representatives

Don Auger, Nishnawbe-Aski Legal Services
 Anita Cameron, Kenora Community Legal Clinic
 Paul Lantz, Keewaytinok Native Legal Services
 Noelle Spotton, Aboriginal Legal Services of Toronto

TOPIC II

THE LANDSCAPE OF CIVIL DISPUTING IN ONTARIO: WHAT DO WE KNOW?

EMPIRICAL ANALYSES OF CIVIL CASES COMMENCED AND CASES TRIED IN TORONTO 1973-1994

JOHN TWOHIG, CARL BAAR, ANNA MYERS
AND ANNE MARIE PREDKO

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EMPIRICAL ANALYSES OF CIVIL CASES COMMENCED AND CASES TRIED IN TORONTO 1973-1994

JOHN TWOHIG, CARL BAAR, ANNA MYERS
AND ANNE MARIE PREDKO

1.0 INTRODUCTION*

“When you cannot measure your knowledge is meagre and unsatisfactory”.¹

In a background paper prepared for Ontario’s Civil Justice Review, Professor Roderick Macdonald noted the absence of empirical information about the civil litigation system. It was his conclusion that “... the will to act is all that has been lacking.”² Macdonald is not the first to note this shortcoming. The importance of empirical research in judicial administration has been emphasized by many others. Leo Levin has stated:

In formulating appropriate policies for improving judicial administration, a priori assumptions, rhetoric, exhortations and advocacy - characterized as traditional staples of the effort to reform - are an inadequate substitute for reliable information and rigorous evaluation.... Research can provide the reliable information necessary for designing change and the objective facts for evaluating results.³

Unfortunately there appears to be no clear body of knowledge to answer some of the basic questions about civil disputing in our courts. Despite the fact that legal scholars have long

* The preparation of this paper required the assistance and cooperation of a number of people. Professor John McCamus, Chair of the Ontario Law Reform Commission and Sandra Wain, Director of the Policy Division of the Ministry of the Attorney General provided inspiration and support of the research as part of the province’s Civil Justice Review. Pardip Bedi, Warren Dunlop and Dorothy Gonsalves-Singh gave helpful comment on the research design. April Takeda performed extensive data runs and checks for statistical significance of the data. Toronto Courts Services Manager Huguette Malyon and her staff provided cooperation with file retrieval. Lawyers Sharon Layton, Kathleen Lickers and Bradley Gotkin diligently undertook the review of court files at the Office of the Archivist, Ministry offices, the courts and various warehouses in Mississauga. Grace Heng provided a high standard of secretarial support.

¹ A maxim attributed to Lord Kelvin in C. Pritchett, *The Roosevelt Court, A Study In Judicial Politics And Values, 1937-1947*, at xi (1948).

² Roderick A. Macdonald, “A Study Paper on the Prospects for Civil Justice” (1995) Ontario Law Reform Commission.

³ A. Leo Levin, “Research in Judicial Administration: The Federal Experience” (1981) 26 New York Law Rev. 237 at 241.

recognized that "systematic collection of data is needed for reasoned and effective policy making",⁴ there has been no comprehensive effort to undertake this task for civil justice.⁵

There have been a limited number of empirical studies about Ontario's civil justice system.⁶ Most of these works have concentrated on selected time frames and did not consider long term trends in civil disputing. The situation elsewhere in Canada is similarly bleak. This is indeed unfortunate in view of the impact, or perceived impact, that civil litigation has upon our economy, the insurance industry, health care system and other aspects of our everyday lives.

There is no doubt that empirical information is collected about the civil justice system by many different groups. Insurance companies collect information about the frequency of tort litigation, banks about economic indicators and the ability of judgement debtors to pay, and courts about the number of orders issued, claims filed and trials held. How can all of this information be coordinated and formulated into a rational whole? What are the gaps that need to be filled to give us a better picture of civil disputing? What have been the significant trends in civil disputing over the last twenty years and how can these trends be explained?

⁴ Marc Galanter, Bryant Garth, Deborah Hensler and Frances Kahn Zemans, "How to Improve Civil Justice Policy" 77(4) *Judicature* 185 (1994). These authors support the development of national "civil justice indicators" which would be similar to criminal justice indicators produced by the U.S. Bureau of Justice Statistics. This idea was first proposed by Professor Stanton Wheeler of Yale Law School in the early 1970s.

⁵ In Ontario there has been a longstanding call for more empirical information about the judicial system. See, for example, the Royal Commission Inquiry into Civil Rights (the McRuer Report), v.2, part 2, pp.618-620, 1968. McRuer laments "there is no satisfactory statistical information available to show what is being done in the courts throughout Ontario. This Commission endeavoured to get facts and figures as to the state of the ... work in the county of York, but the records weren't sufficient to enable us to compile any satisfactory information." The Inquiry recommended "an efficient, uniform, province-wide system be set up to record the work of the courts in civil and criminal cases." The Ontario Law Reform Commission Report on the Administration of Ontario Courts, 1973, part 1, chap.2, dealt with statistical information under the heading "Management Information Systems and the Court" pp. 35-44. The Commission called for improved management of the court system which was to be based on "...meaningful, accurate and timely information about the courts' workload and performance upon which to base decisions." The Report of the Ontario Courts Inquiry (the Zuber Report), 1987, similarly commented upon the need for management information at pp. 188 and 189. Mr. Justice Zuber recommended "... a sophisticated, computerized management information system to be installed in the courts of Ontario to provide ready access to at least the following information: 1) nature and size of cases commenced; progress of cases through each major step; adjournment rates; number and type of dispositions; elections in criminal cases; sitting hours and days available at each location for each court; actual sitting hours and days at each location for each court; judges' sitting schedules and actual time of sittings, broken down by type of case; average hearing time for each type of case in each court. The information should be readily accessible in each major court centre for all centres of the province." In response to the Zuber Report, an umbrella organization of lawyers known as the Joint Committee on Court Reform identified problems in the current system and suggested solutions in the Report of the Joint Committee on Court Reform, December 8, 1988. The problems identified were 1) excessive costs and delay; 2) lack of adequate funding allocated to the justice system; 3) inadequate court facilities; 4) *absence of a reliable database* (emphasis added); 5) archaic management techniques; 6) insufficient use of modern technology.

⁶ W.A. Bogart and Neil Vidmar, "Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment" in A. Hutchinson (ed.), *Access to Civil Justice* (Toronto: Carswell, 1990) 1; Carl Baar, "The Reduction and Control of Civil Case Backlog in Ontario", A Report to the Civil Litigation Task Force of the Advocates' Society, June 1994; *The Bottom Lines*, Court Reform Task Force, Ministry of the Attorney General, June 1990; *Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Court of Justice*, A report to the Ministry of the Attorney General, November 1993; Quindecia Corporation, *Justice in Ontario: A Change of Pace*, October 1994; Barbara Holman, "Pace and Patterns of Civil Litigation" (1986) Windsor Y.B. Access to Justice 194; Barry Mahoney, "Review and Recommendations Concerning Case Management in Ontario", November 1992.

This paper is a modest effort to answer these ambitious questions. It is intended to be a building block, to advance the analysis one step further, so that the nature of civil justice information in Ontario might be put into a clearer focus.

2.0 STUDY DESIGN AND EXPECTATIONS

The general purpose of the survey was to catalogue the changes in civil litigation patterns in Toronto during the past twenty years and to note salient changes and trends. Some of the more specific objectives of the survey were:

- To obtain a profile of litigants in the civil justice system. This profile should reveal the percentage of litigants that are individuals, corporations, governments, banking institutions, partnerships or sole proprietorships. In addition the relationship between the litigants as either business, personal, professional or governmental plus the length of time of the relationship were considered.
- To measure the complexity of litigation as seen in terms of number of changes of lawyers, multiple party litigation, number of motions, amount and type of relief sought, the trial rate and the incidence of cross claims, counterclaims, set-offs and third party claims.
- To obtain some basic time measurements of the pace of litigation including from the time of cause of action to the time of filing, from filing to defence and defence to disposition.
- To obtain and compare defence rates, trial rates, types of disposition and types of cases filed over the twenty year period considered.
- To compare changes in caseload size with changes in population, the number of judicial offices, the number of lawyers, the increase in the general population and general economic indicators.
- To record, where possible, the impact of legislative, procedural and organizational changes upon the civil litigation system.

All of these expectations were met as will be explained later in the paper.

There were limitations to this study. The more general limitations are noted below.

(a) Applications not included—The study does not include every facet of the civil litigation system. Applications were not reviewed. In a case commenced by way of application, evidence is presented by affidavit and not in a continuous oral trial. There are a number of statutes which prescribe certain rights and remedies which must be pursued in the courts by way of application. The procedure governing applications changed drastically in 1985. Prior to that time the procedure was referred to as a proceeding by way of originating notice of motion. The 1985 amendments broadened the scope of the procedure and therefore it would be difficult to usefully compare the pre and post 1985 litigation. In addition to this fact, there appeared to be some highly erratic and dubious reporting of this activity in the annual reports. For these reasons applications were not included in this study, however, this is an area which would benefit from empirical research. The exception to this general observation are landlord and tenant applications. Statistics in this area appear to have been accurately recorded over the past twenty

years. Almost 1200 of these types of applications were reviewed as part of a separate study related to the Civil Justice Review.⁷

(b) Family law cases not included—Most family law litigation in the Ontario Court (General Division)⁸ is found in divorce petitions, applications and in a small percentage of the cases by way of actions. As noted applications were not included, nor were divorce petitions or family cases commenced by way of action leading to a continuous oral trial. When this latter type of file was selected as part of the random selection procedure it was replaced by another civil action file.

(c) Small Claims Courts not included—A complete picture of the civil justice system should include a survey of small claims court. In view of recent jurisdictional increases the importance of this court cannot be underestimated. There have been some studies undertaken of this court in Ontario and there is a major undertaking now ongoing in Quebec.⁹ Although a paper has been prepared for the Civil Justice Review concerning the Small Claims Court, it has not been supplemented by this type of empirical research.

(d) The survey is confined to Toronto courts—A review of a sample of claims filed at every court location in the five fiscal years considered here would be an extraordinary and expensive undertaking. While information about courts outside Toronto is vitally important, this deficiency may not be as glaring as it might seem. Firstly, the Toronto courts account for approximately 40% of the civil litigation in the province and as a result the survey covers a significant portion of the civil litigation which took place in Ontario in the past twenty years. Secondly other studies have shown that while there were significant differences between Supreme and County Court cases there was little difference in the basic characteristics between each County Court and between Supreme Court cases at various court filing offices.¹⁰

A complete description of the methodology used as the basis for this paper can be found at Appendices 1 and 2. A general outline of procedures can be given here. This study starts with a review of civil dispute activity in 1973. This year was chosen because it was the first year that annual court statistical reports were produced by the Ministry of the Attorney General. These reports provide a useful starting point for the provision of macro level data such as number of claims filed, orders and judgements issued and trials heard, on both a county and province wide level. This information allowed planning to be made about appropriate sample sizes, the location of files and other research needs. Time and resources did not allow a longer term study but this is a useful and potentially important start.

⁷ The results of the Landlord and Tenant study are summarized in Section 7.

⁸ This changed after August 1, 1995 with the establishment of the Family Court branch of the Ontario Court (General Division) in Barrie, London, Kingston, Napanee and Hamilton. The Family Court branch will handle all family law matters previously dealt with in the General Division and Provincial Division of the Ontario Court of Justice.

⁹ Ann Cavoukian and Steve McCann, "Evaluation Report of the Provincial Court (Civil Division): Empirical Research Findings Relating to Claims Between \$1000 and \$3000" Ministry of the Attorney General, 1982 and Quebec, Groupe de travail sur l'accessibilité à la justice, *Jalons pour une plus grande accessibilité à la justice*, (Quebec: Ministère de la justice, 1991).

¹⁰ See *The Bottom Lines*, *supra*, note 6.

In accordance with the data collection format in the Court Statistics Annual Reports, samples were chosen based on the government fiscal year which is April 1 to March 31. Five fiscal years were chosen at five year intervals. All of the cases in this study were filed in the courts in Toronto which is the largest court centre in the province. Two distinct surveys were undertaken. The first, known as the commencement study, sampled cases across the complete range of civil actions in each of the five fiscal periods. Applications, family law cases and divorce petitions were not included. Table 2.1 sets out the number of cases filed in the courts and the sample sizes chosen for each of the fiscal years reviewed. A case is a civil action commenced by way of writ of summons before 1984 and by statement of claim after 1985. A second survey consisting of cases that actually went to trial in the fiscal periods under review was also undertaken. Table 2.2 describes the sample for the trial survey.

TABLE 2.1 Cases Commenced, Toronto, and Sample Size

Years	Cases Filed 361 Univ.	Cases Filed 145 Queen	Total Filed	Minimum Required Sample Size	Actual 361 Univ. Sample	Actual 145 Queen Sample	Overall Sample Size
1973- 1974	28,494	6,472	34,966	380	335	92	427
1978- 1979	23,812	13,071	36,883	380	316	171	487
1983- 1984	23,527	11,929	35,456	380	254	136	390
1988- 1989	32,761	9,110	41,871	380	291	137	428
1993- 1994	9,194	14,669	23,863	380	182	252	434
TOTAL COMMENCEMENTS REVIEWED							2166

The minimum sample requirements is based on standard random sampling techniques.¹¹

The trial sample fell below the minimum sample requirements. This was not considered problematic since it would appear that the number of trials was inflated. Typically, court offices only record the number of cases set down for trial and not the number of actual trials. The former is always a larger number than the latter. A similar experience was encountered by the Ontario Law Reform Commission in its 1996 study of civil jury trials.

There are a number of reasons for proceeding with two samples. It is well known that a very small percentage of cases proceed to trial. Most reports put the figure at approximately 3 to 5%

¹¹ See for example, Table 9 entitled "Determining Sample Size from a Given Population" in Fitzgibbon, Carol Taylor and Mories, Lynn Lyons *How to Design Program Evaluation* (California: Sage Publications, 1987).

of all cases filed.¹² Trials are assumed to be the events which consume a lot of judicial and courtroom resources. The percentage of cases that went to trial in the commencement study would not be large enough to allow any useful conclusions to be drawn about cases tried. The focus of these surveys then is to learn something about the intake of civil disputes and the courtroom activity of civil disputes in the periods under review.

A word must be said at this point about the records that were actually reviewed. The material consisted of court files opened at the time of the initiation of a civil dispute. While other sources of information may be available such as court clerk minute books, transcripts of certain proceedings, judges' bench books and case index cards, the court file was considered to be the record which would provide the best summary of the nature of the civil dispute. Information in the hands of the litigants would supplement some of the gaps in court files but the tracing of these sources is an expensive and time consuming task which did not appear to be justified by the results which could be achieved. The procedures ultimately adopted were, as might be expected, largely dictated by time, resources and the information needed to meet the study design and expectations. By keeping the purpose of the study squarely in mind, researchers were able to move forward through a vast array of available data and present the findings described in this paper. Before reporting the data from these surveys, it is useful to summarize and examine overall trends based upon previously published data.

TABLE 2.2 Trials, Toronto, and Sample Size

SUPREME COURT					DISTRICT COURT				
Year	Non-Jury	Jury	Non-Jury	Jury	Total Cases	Minimum Required Sample Size	Actual 361 Univ. Sample	Actual 145 Queen Sample	Actual Overall Sample Size
1973-1974	250	51	819	89	1309	291	199	69	268
1978-1979	295	48	1189	91	1623	311	229	68	297
1983-1984	318	42	710	59	1129	288	183	87	270
1988-1989	280	47	421	124	872	267	121	112	233
GENERAL DIVISION									
Non-Jury			Jury		Total Trials	Minimum Sample	Actual 361 Univ.	Actual 145 Queen	Actual Sample
1993-1994	887		264		1151	288	135	117	252
TOTAL TRIALS REVIEWED									1320

¹² *Supra*, note 6.

3.0 HISTORICAL PROFILE OF CIVIL COURT CASELOAD IN TORONTO

SUMMARY OF THIS SECTION

- *Statutory and procedural changes are presumed to have influenced the type and pace of litigation.*
- *Civil causes of action are proportionally less of the court's filings in 1994 than in 1974.*
- *Landlord and tenant applications, motions and other applications are proportionally more of the court's filings in 1994 than in 1974.*
- *In 1994 civil filings reached a twenty year low, after a twenty year high in 1992.*
- *Divorce petitions and summary conviction appeals appear to have little influence on the volume of work in the Ontario Court (General Division).*
- *Criminal trials increased in number through the 1980s and have now returned to the volumes recorded in the mid 1970s. It is suspected however that these trials are much lengthier and as a result impact the civil trial list.*
- *Total dispositions are decreasing, but when divorce dispositions are factored out, trials of civil claims which arise from a cause of action are increasing.*

3.1 CHANGES IN THE COURT SYSTEM

Knowledgeable observers of the justice system in Ontario often attribute the changes in the court's ability to handle civil cases to a variety of constitutional, statutory and procedural changes to the court system. Many changes did occur in this twenty year period, and it is helpful to catalogue these developments and to consider their effect on the work of the court. Listed below are the major statutory, procedural and structural changes to the Ontario courts between 1974 and 1994.¹³

3.1.1 Changes in Substantive Law

- (i) *Landlord and Tenant Act, 1975*
- (ii) *Family Law Package, 1978 (FLRA, CLRA, SLRA)*
- (iii) *Provincial Offences Act, 1979*
- (iv) *Charter of Rights, 1982*
- (v) *Divorce Act, 1985*
- (vi) *no fault auto insurance legislation, 1990*
- (vii) *Class Proceedings Act, Jan. 1, 1993*

¹³ Another factor which is suspected to have had a major impact on the courts in the past twenty years is the emergence of lengthy criminal and civil cases. A partial list of some of the more notorious cases would include:

Criminal

- R. v. Burnet* (income tax case - 6 years)
- R. v. Rowbottom* (drug case - 1.5 years)
- R. v. Hamilton* (dredging trial - 1.5 years)

Civil

- Lac Minerals* (1.5 years)
- Olympia and York* (3 years)
- Crown Trust* (2 years)
- Air India* (4 years)
- Mississauga Train Derailment* (3 years)

3.1.2 Court Process Changes

- (i) the new rules of practice 1985
- (ii) status hearing rules, 1985
- (iii) *Courts of Justice Act*, 1989¹⁴
- (iv) increase in the use of applications after January 1, 1985
- (v) reduction in the number of masters available since 1990 to deal with motions

3.1.3 Court Structural Changes

- (i) Divisional Court, 1972
- (ii) Surrogate Court Structure, 1977
- (iii) Small Claims Court, 1981
- (iv) District Court of Ontario, 1985
- (v) *Courts of Justice Act*, 1990

3.1.4 Criminal Caseload

- (i) *R. v. Askov* 1990
- (ii) other impacts of criminal law legislation since 1973

3.2 INTRODUCTION TO COURT STATISTICS

Since 1974, the Ministry of the Attorney General has published annual statistical reports that summarize caseload activity in all levels of the Ontario courts, broken down by type and level of court, and by judicial region. The information provided in this chapter is drawn from these published statistical reports.¹⁵

The two sample surveys reviewed writs and statements of claim for civil matters commenced in Toronto, and therefore detailed analysis is provided for this group of claims. For some years, the annual reports have broken civil writs or claims into sub-groups of motor vehicle, family law, and other. In earlier years, specially and generally endorsed writs were separated. Specially endorsed writs were issued for claims for liquidated damages. Generally endorsed writs were issued for claims for all other types of damages, which had to be proven. Mechanics and construction lien claims were reported separately in some years, and included in the "other" category in other years. To allow analysis over the twenty year period of the study, the sub-groups of motor vehicle, family law statements of claim, construction liens and other have been combined together to form a category which we have called "Civil Claims".

¹⁴ The merger of the Supreme and District Court had a dramatic impact on the court process in Toronto. Much of the motion work of the former District Court was diverted to masters or court staff. Former District Court judges began doing more divorce trials. The motion practice changed dramatically from the appointment system used in the former Supreme Court to the set down practice in the former District Court. The criminal trial process used in the former District Court was adopted by the new merged court (Ontario Court (General Division)).

¹⁵ Prior to 1990, Metropolitan Toronto was part of the Judicial District of York for all court purposes. At the beginning of the study, in 1974, the Judicial District of York included what was then the County of York (i.e. Newmarket, Markham, Richmond Hill). The County of York was made a separate judicial region in 1980. Between 1980 and 1990, the Judicial District of York included only Metropolitan Toronto. The term "Toronto" is used in the following chapter to refer to both the Judicial District of York and Metropolitan Toronto. Of necessity, filings from the County of York are included in the statistics prior to 1980, but these made up only a very small quantity of the total filings. After 1990, Metropolitan Toronto is referred to as Toronto Region and not the Judicial District of York.

In addition to traditional causes of action, the civil section of the annual reports includes information on divorce petitions, landlord and tenant applications and motions/applications. In handling these various matters, the civil courts face competing claims on their resources. It must be remembered that the civil caseload does not occur in a vacuum, but rather against a backdrop of criminal and appellate work. To give a flavour of the overall court environment during this twenty year period, some brief analyses of the criminal, divorce and appellant caseload in Toronto are provided.

It is particularly difficult to measure the impact motions/applications may have had on the allocation of judicial resources. Prior to 1985, applications were called originating notices of motion. This proceeding should not be confused with the usual interlocutory motion procedure which existed prior to 1985 and continues today. The 1985 amendments broadened the scope for applications. In addition to this fact, data on motions/applications are not complete for the twenty year period. In particular the years between 1974 and 1978 do not accurately report motion/application activity. However, the information which is available clearly indicates that motion and application activity in Toronto has formed an increasing portion of civil filings, especially after the reform to the application procedures in the Rules of Civil Procedure adopted in 1985. The specific sub-group of landlord and tenant applications has increased substantially during this period. More will be said about landlord and tenant matters later in this chapter.

3.3 BREAKDOWN OF CIVIL FILINGS BY TYPE OF ORIGINATING PROCESS

Although the sample surveys excluded certain types of civil matters from review, in particular all matters commenced by application, it is useful to see what proportion of the Toronto civil caseload relates to writs and/or statements of claim. Figure 3.1 below illustrates the proportion of the overall civil filings that falls within our definition of "civil claims", for the five fiscal periods covered by the surveys. Figure 3.2 presents the same statistics by way of a bar chart, to illustrate the fluctuation in overall numbers of filings.

Figure 3.1 illustrates how traditional statements of claim are becoming a smaller "slice of the pie".

Figure 3.1 Proportion of Toronto Civil Filings for Five Fiscal Periods

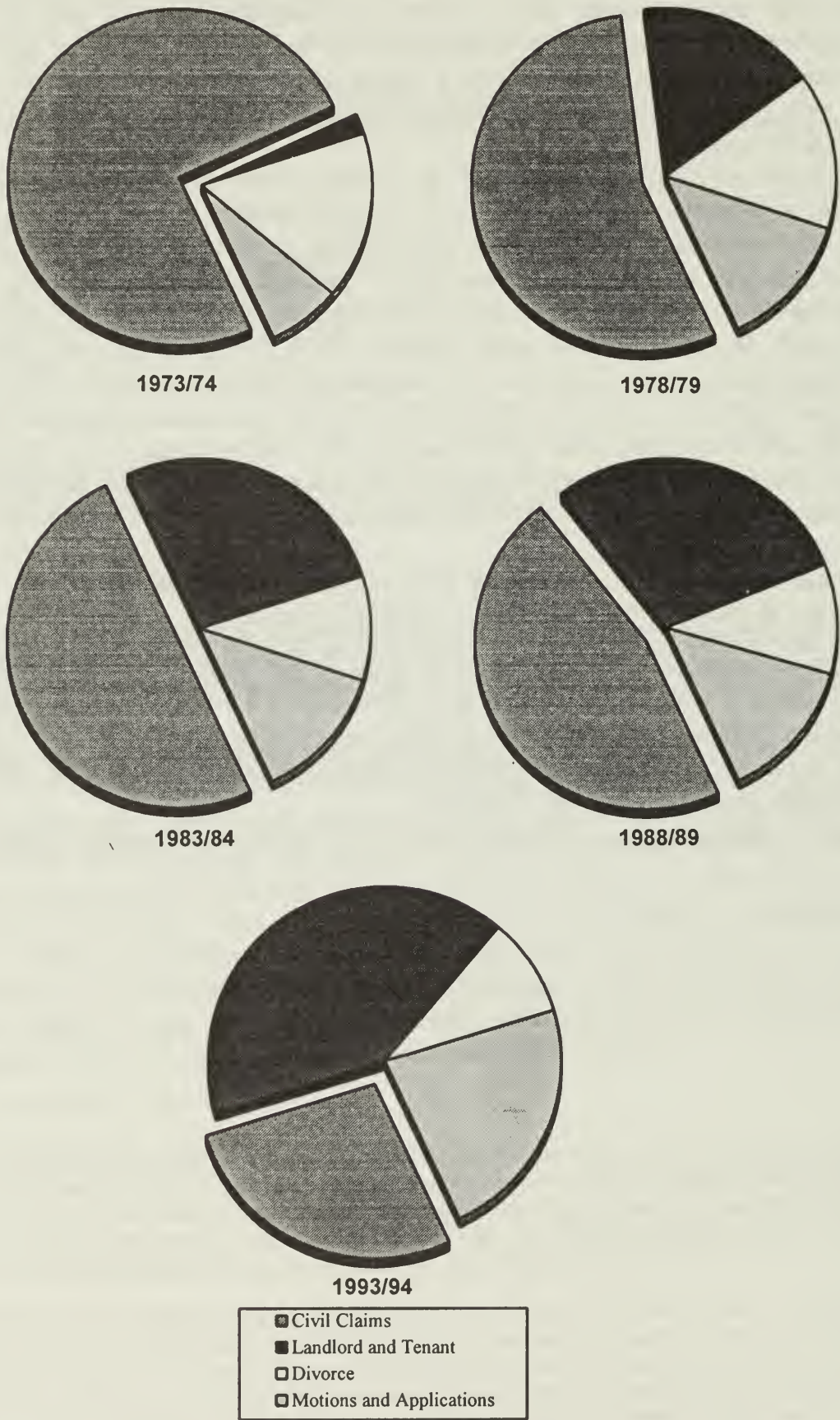
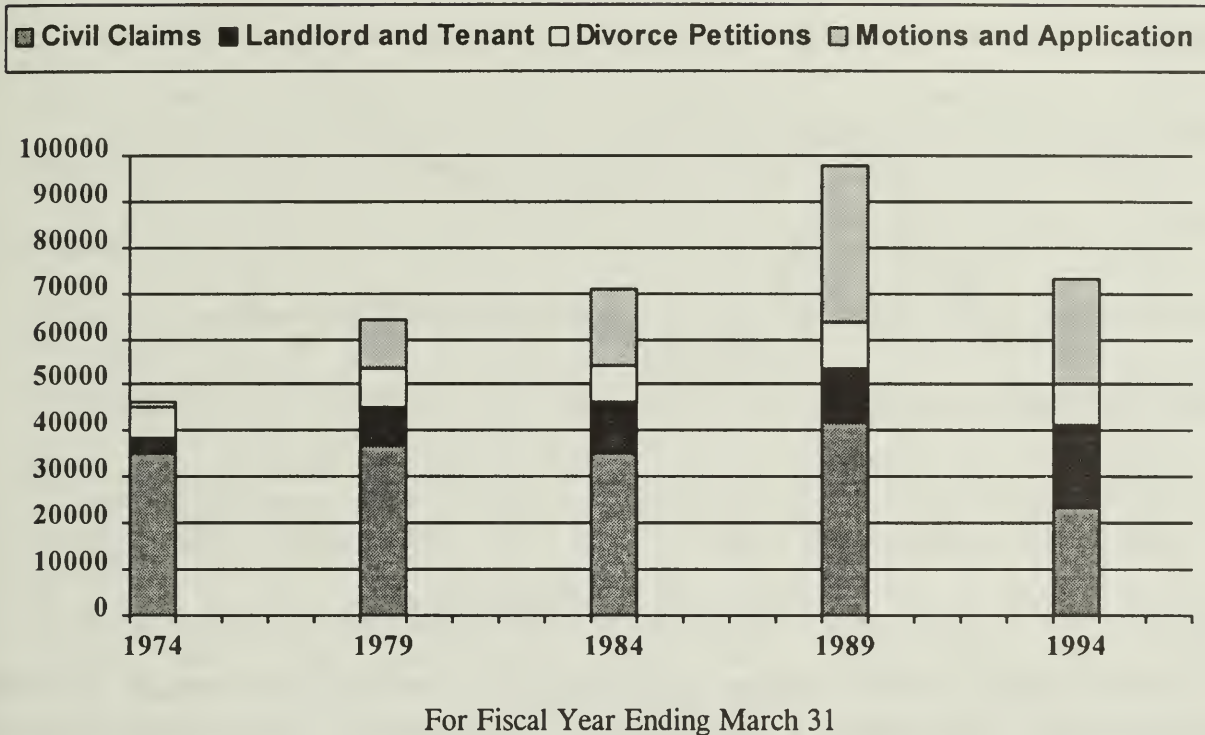


Figure 3.2 Breakdown of Total Toronto Civil Filings by Type of Claim, 1974-1994

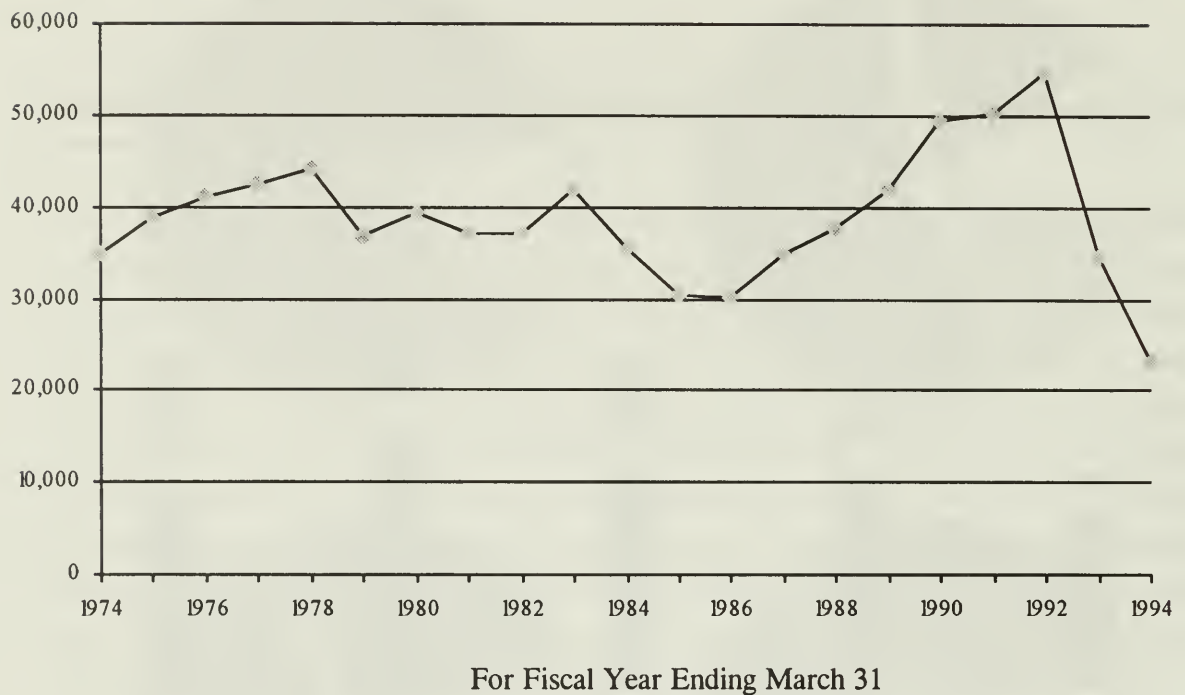


There has been steady increase in the number of landlord and tenant applications and motions/applications¹⁶ as a proportion of the “civil” pie. Currently, with the decrease in motor vehicle claims, the filing of statements of claim is at a twenty year low. Figure 3.2 illustrates that the court has experienced increased volumes of civil filings, and at the same time, greater diversity in the types of matters and procedures which individuals are bringing to court.

3.4 CIVIL CLAIMS COMMENCED

Civil claims commenced by way of writ or statement of claim rise and fall over the twenty year period in a pattern which may be related to economic trends. Over the first 15 years of our study civil claims commenced fluctuated between thirty and forty five thousand per year. However, in the latest economic downturn of 1990-1992, claims rose dramatically, to a twenty year high of 54,831 in 1992. Claims then drop sharply, to a twenty year low of 23,223 in 1994. Figure 3.3 tracks the twenty year pattern of claims filed.

¹⁶ In 1973/74, all matters which were commenced by way of originating notice of motion, with the exception of bulk sales and change of name, were indexed together, in the District Court office Matters index. In total approximately 3800 matters were recorded in the book. Since approximately 3600 were landlord and tenant applications, the best estimate we have for motions/applications is 200. This is clearly inaccurate because it does not include originating notices of motion in the Supreme Court of Ontario. The 1979 Supreme Court motion/application numbers are also suspect.

Figure 3.3 Civil Claims Commenced, Toronto 1974-1994

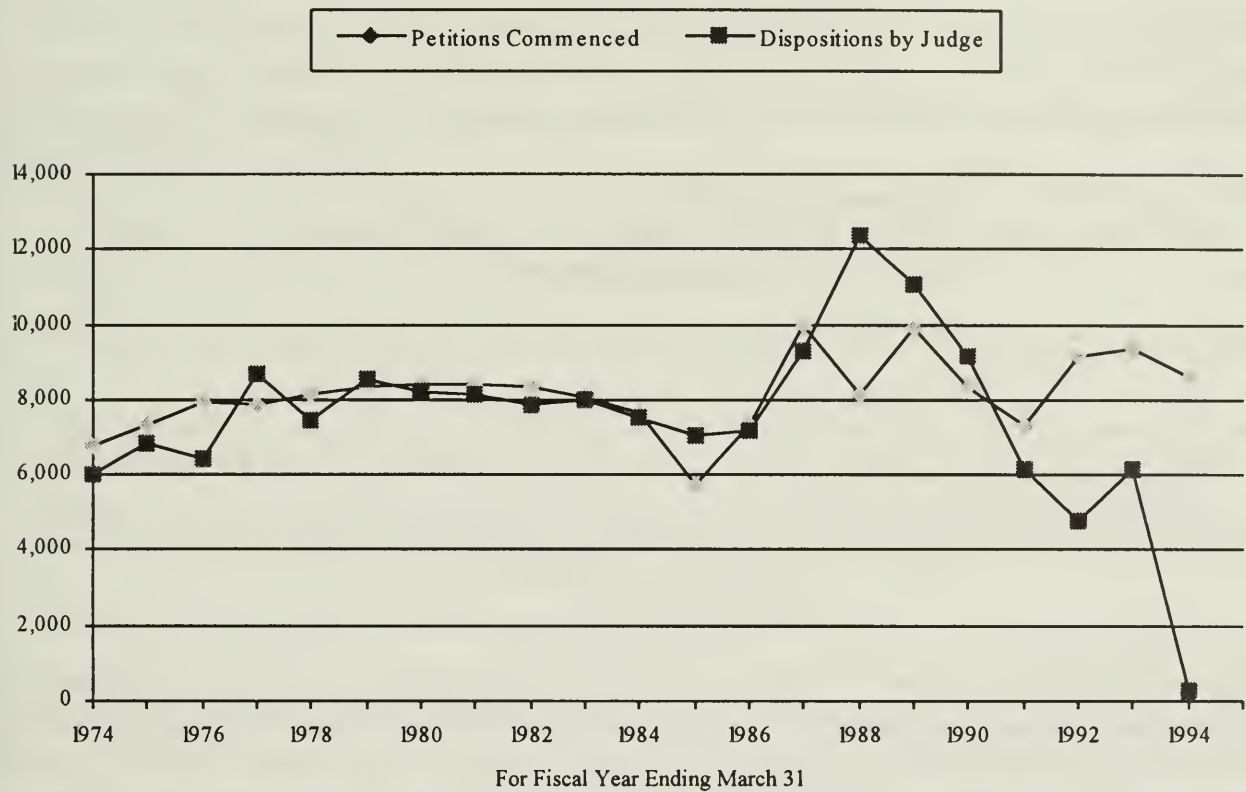
The drop in claims after 1992 follows the introduction of no-fault auto insurance, but it also may express a drop which follows a rise associated with a recession. Motor vehicle claims are tracked separately in the annual statistical reports, and even after the loss of these claims is factored out of the commencements, it is clear that the number of statements of claim still falls from 1992 to 1994. For example, non-motor vehicle claims numbered 31,913 in 1990, which increased to 43,034 in 1992 and dropped to 21,319 in 1994. Interestingly, claims also dropped in 1984 to 1986 following the recession of the early eighties.

It is important to realize that the overall number of statements of claim is decreasing, and that the busy period currently being experienced by the courts most likely results from the unusually high rate of commencements in 1992.

3.5 DIVORCE PETITIONS

Divorce petitions filed in Toronto remained fairly steady at between seven and nine thousand for the years 1974 to 1984. They then dipped during 1985, possibly in anticipation of changes to the *Divorce Act*, then rose to new heights in 1987 through 1989. The vast majority of divorce petitions lead to a disposition, unlike statements of claim, which may be commenced and then have no further action taken. Therefore, an increase in divorce filings may have a higher impact on court resources than an increase in statements of claim. Figure 3.4 compares divorce commencements (filing of the petition) to divorce dispositions before a judge. A 1993 change in procedure for divorce petitions has eliminated the need for a couple to attend before a judge unless some aspect of the divorce is contested. As a result, the number of dispositions by a judge has fallen off drastically. Currently, the petitioner files proof of separation in the form of an affidavit, and the *decree nisi* is issued by the registrar.

**Figure 3.4 Divorce Commencements Compared to Divorce Dispositions (by Judge)
Toronto 1974-1994**



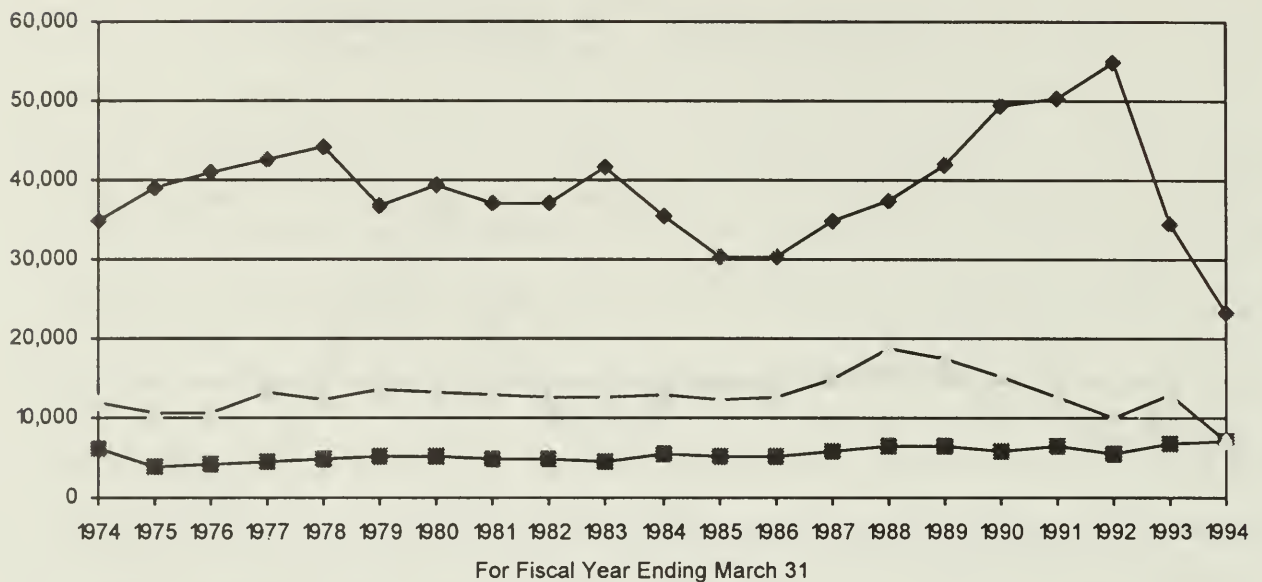
3.6 CIVIL CLAIMS DISPOSITIONS (FROM THE TRIAL LIST)

Approximately 10% of cases proceed to the listing for trial stage. These cases are the most draining on court and judicial resources. Many claims result in default judgements, but this category of disposition is not currently reported in the annual statistical report. Reported information about trial list activity for civil matters can provide a brief sketch of the workload of the courts and the judiciary.

Trial list activity summaries provide two categories of dispositions: “Trials” which include matters which were tried, or which were settled during the trial and “Total Dispositions” which includes tried, settled before or during the trial, and struck off the list. The number of trials is very small in proportion to the number of actions commenced, or even the total dispositions, since the majority of recorded dispositions are the result of default judgements and not trials. It should be remembered that a large number of cases commenced have no official disposition recorded in court statistics. These cases are commenced and never officially processed for a variety of reasons. However, since the listing for trial process, and the trial, are so demanding on court resources, it seemed worthwhile to examine the rate of dispositions from the trial list.

Figure 3.5 compares civil claims commenced with the total dispositions category from the trial list summaries, both including and excluding divorce dispositions. These dispositions reflect civil matters which were listed for trial and recorded as disposed in the following categories: tried, settled, settled at trial or struck from the list.

Figure 3.5 Civil Claims Commenced Compared to Civil Dispositions (Including and Excluding Divorce), Toronto 1974-1994



The commencement figures in Figure 3.5 do not include divorce petitions, and therefore, would be most accurately compared to the disposition figures which exclude divorce (boxed line).

When divorce dispositions are included, the picture changes (starred line). Now we see the highest rate of dispositions in 1988, when over 12,000 divorces were processed. The vast majority of these 12,000 went before a judge, and are reported as a trial, but the reality of a divorce trial at this time was that it involved summary proof of the separation. Because of the summary nature of these trials, some observers may have had unrealistic expectations of the level of dispositions which the court could achieve. In 1993/94, when the procedural rules no longer required that separation be proven before a judge, only 156 divorce trials are recorded. Therefore, although total civil dispositions from the trial list are declining, trials of civil claims, such as those examined in the trial survey, are increasing in number.

3.7 CIVIL CLAIMS PENDING ON THE TRIAL LIST

Baar's paper "The Reduction and Control of Civil Case Backlog in Ontario",¹⁷ debunks the myth that cases pending on the trial list at the end of the year reflect the court's backlog. According to Baar, these cases are part of the court's inventory, and do not necessarily reflect the number of cases which are delayed coming to trial. Many cases are listed for trial in order to arrange a pretrial, and many others settle after the listing stage, but the court is not informed of the settlement. Without a time standard for the ordinary case, and a method of tracking individual cases, the paper argues that it is difficult to have an accurate picture of backlog.

¹⁷ Carl Baar, "The Reduction and Control of Civil Case Backlog in Ontario" Report to the Civil Litigation Task Force of the Advocates Society June 1994. at p. 3.

The annual reports do not provide any data on the age of civil matters on the trial list; the inventory figures are the only measure of backlog possible from this source. The inventory figure should be considered in conjunction with the trial rate discussed in Section 8.

Figure 3.6 illustrates the steady increase in the cases pending on the trial list, despite wide fluctuations in the number of commencements. Table 3.1 provides the total jury and non-jury cases pending for Toronto, and expresses the numbers as a percentage increase or decrease over the previous year's inventory.

**Figure 3.6 Claims Commenced Compared to Cases Pending on the Trial List
Toronto 1974-1994**

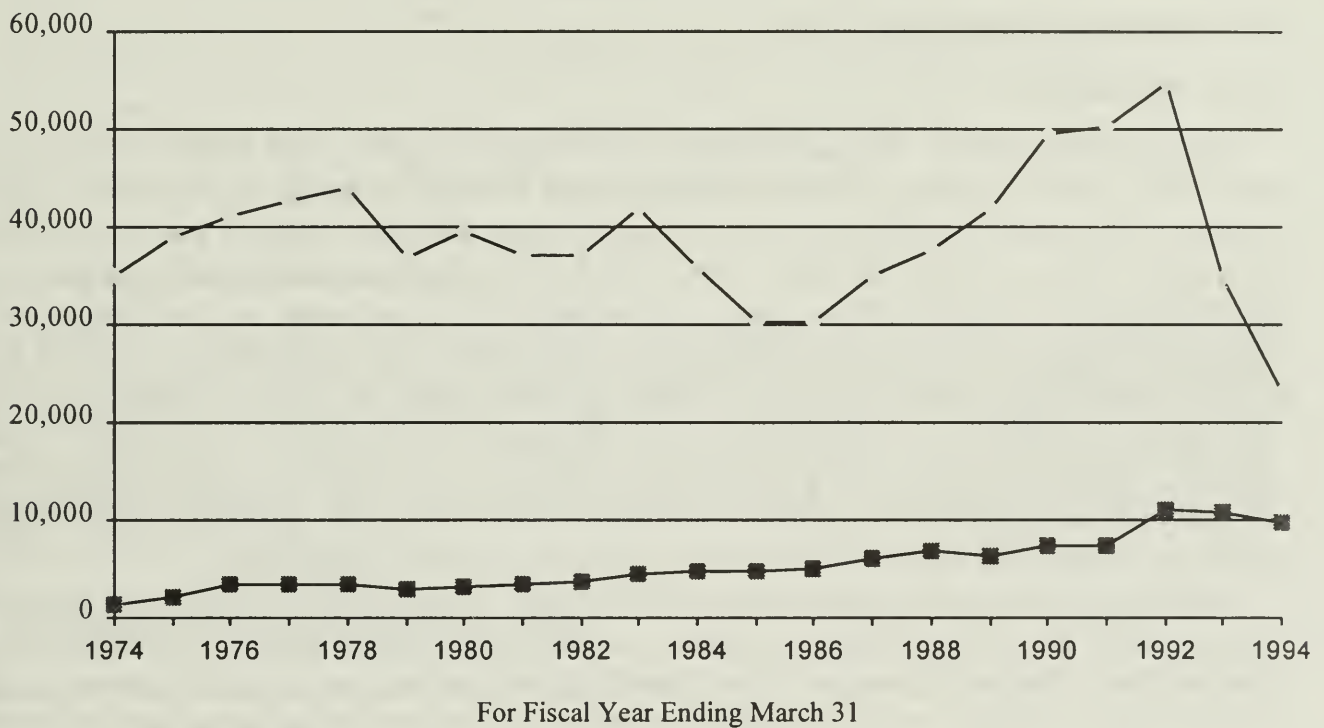


TABLE 3.1 Civil Inventory Toronto 1974-1994

YEAR ENDING MARCH 31	CASES PENDING (EXCLUDES DIVORCE)	PERCENT INCREASE OR DECREASE
1974	1351	N/A
1975	1544	13.5%
1976	2120	37.3%
1977	2846	34.2%
1978	2543	-10.6%
1979	2155	-15.2%
1980	2075	-5.5%
1981	2422	16.7%
1982	2514	3.7%
1983	3539	40.7%
1984	3823	8.0%
1985	3967	3.8%

1986	4207	6.0%
1987	5259	25.0%
1988	5678	8.0%
1989	5046	-11.1%
1990	6866	36.1%
1991	6937	1.0%
1992	10189	46.9%
1993	10688	4.9%
1994	9615	-10.0%

3.8 CRIMINAL CHARGE ACTIVITY

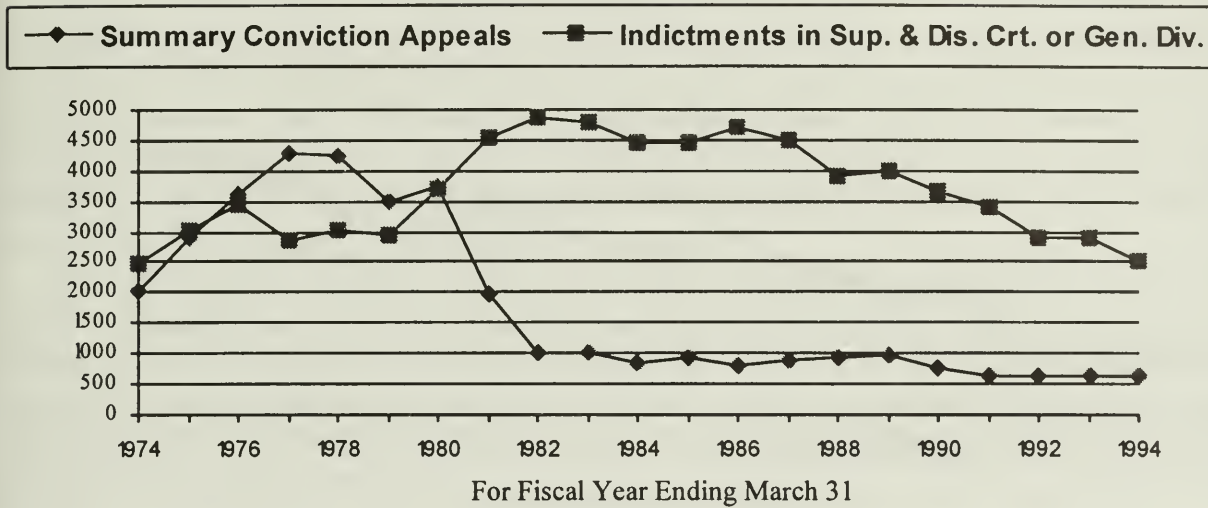
3.8.1 Indictments

Many serious criminal charges proceed to trial before a higher court. Before the merger of the Ontario courts in 1990, indictable offences could be heard by either the Supreme Court of Ontario or the County or District Court. Currently, some indictable offences are brought before the Ontario Court (General Division). Many indictable offences are dealt with by a Provincial Court judge, at the option of the accused. However, for our purposes, we have attempted to identify the number of matters proceeding before the Ontario Court (General Division), or prior to 1990, before the Supreme Court of Ontario and the County or District Courts. Figure 4.7 illustrates the distribution of indictments over the twenty year period. The volume of such offences has decreased over the past ten years, perhaps as a result of a higher proportion of accused persons opting to proceed before a Provincial Court judge and of the extension of hybrid offence provisions which allow the crown the option of proceeding summarily.

Although no empirical evidence can be offered here, it seems clear that while the volume of criminal trials has decreased in the nineties, the length of criminal trials has increased in the Ontario Court (General Division). The Charter alone has been a source of numerous new motions and challenges available to the defence. There seems to be consensus that longer criminal trials have an impact on the civil justice system.

Figure 3.7 illustrates the pattern of indictments in the higher courts, and the pattern of summary conviction appeals.

Figure 3.7 Indictments and Summary Conviction Appeals, Toronto 1974-1994



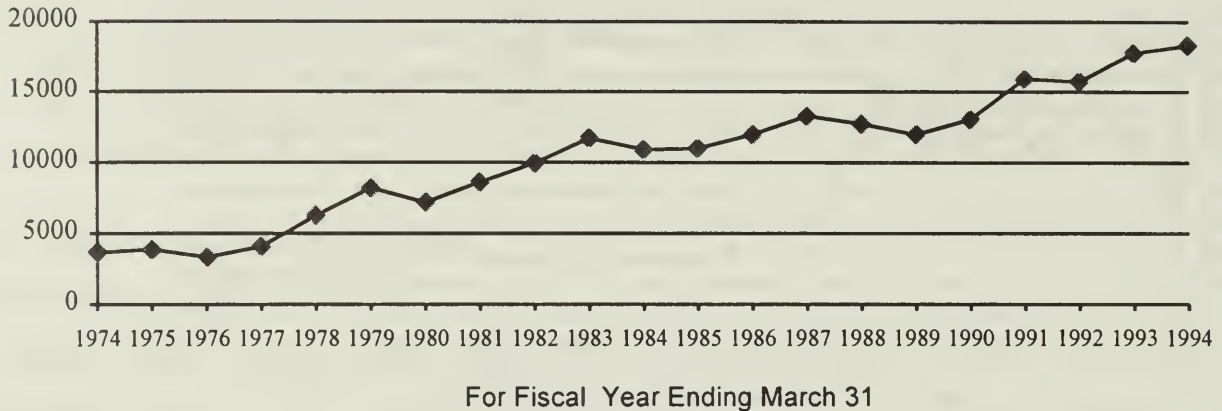
3.8.2 Summary Conviction Appeals

In addition to criminal trial responsibility, the Ontario Court (General Division), and previously the County or District Court, also has appellate jurisdiction over summary conviction matters heard by a Provincial Court judge. As Figure 3.7 demonstrates, the number of appeals is generally decreasing, possibly as a result of procedural changes which make the production of the trial transcript mandatory. This aspect of the criminal caseload is probably not affecting the efficiency of the civil system.

3.9 LANDLORD AND TENANT APPLICATIONS

Landlord and tenant activity increased steadily over the twenty year period. Landlord and tenant applications also increased as a proportion of the total civil filings in Toronto (see Figures 3.1 and 3.2). The vast majority of landlord and tenant applications are brought by landlords against their residential tenants. Commercial tenancies usually specify remedies within the lease, and therefore many commercial tenancy disputes which go to court proceed as a statement of claim for breach of contract. Figure 3.8 illustrates the increase in landlord and tenant applications over the twenty year period.

Landlord and tenant applications were examined in greater detail as part of a separate study. The summary of this study is contained in section 7.

Figure 3.8 Landlord and Tenant Applications, Toronto 1974-1994

4.0 CIVIL COURT ENVIRONMENT

SUMMARY OF THIS SECTION

- *The number of lawyers, judges and courtroom facilities has increased over the twenty year period.*
- *The volume of paper stored in a civil file has increased dramatically, possibly as a result of increased use of document production and information technology.*
- *The population of Toronto, Ontario and Canada has increased.*
- *The economy has experienced periods of expansion and recession, the most recent recession being 1990-1992.*
- *In 1994 the Ontario and Toronto economies are not as strong as they were in 1974 and 1984.*
- *Legal aid funding of civil matters has increased, but funding for civil litigation excluding family matters is a small proportion of legal aid dollars.*
- *Criminal dispositions in the Ontario Court (General Division) have declined slightly.*

This section will provide more information on the context in which the civil justice system of Ontario currently operates and has operated for the past 20 years. The information may provide clues as to the forces shaping the reality of civil litigation in Ontario.

There is a perception that serious problems exist within the civil justice system. The Ontario public, and those within the legal system itself, must have confidence in their civil justice system. Factors such as length and cost of litigation, case backlog, and new legislation are important and problematic.

There is also a perception that we are more "rights" conscious than ever before, and that as individual citizens we are becoming increasingly litigious. There has been a concerted effort to educate the public about their rights and, especially since 1982 and the advent of the Charter of Rights and Freedoms, there has been a great deal of media attention on these and related matters. But has this heightened awareness of rights really translated into increased or new litigation? These issues must be placed in their broader context and basic information - about the courts, the

litigants, and the types of cases being brought - must be gathered and absorbed before certain assumptions regarding the state of civil litigation in the province can be verified.

Many variables may influence the course of civil litigation in the province. Periods of economic expansion may lead to a rapid growth in the number of new businesses whereas periods of recession cause economic difficulties which, in turn, may lead to an increase in the number of business failures. These failures may ultimately end up as a legal claim or result in litigation. Increases in population and changes in population density and corresponding increase in the number of lawyers may also increase court caseload, and result in more judicial appointments and an increased number of courtrooms.

This section will attempt to show some of the variables that may influence our civil justice system. The first part will look at variables which may have a direct impact on the civil courts. These include the number of judges in the province, as well as the number of lawyers, and an analysis of court facilities. Part two will examine criminal statistics and legal aid funding. The third part will look outside the justice system to the rate of population growth and economic indicators over the past 20 years.

4.1 LAWYERS, JUDGES, COURT FACILITIES AND FILE STORAGE

Factors that are directly related to the running of the civil courts in Ontario are presented here as they developed or changed over the 20-year period under review. Some of the information does not relate directly to the five chosen fiscal years because it is unavailable for one or more of the years, or is provided for intervening years. However, an attempt has been made to gather and summarize as much information as possible.

4.1.1 Number of Lawyers

In 1846 the population of Upper Canada was 726,000 and it boasted a total of 450 lawyers.¹⁸

Nearly 150 years later, Ontario has a total of nearly 26,000 lawyers for a population of over 11 million people. The increase in the numbers of lawyers appears staggering and in many senses it is - in 1846, there was one lawyer per 1613 people and in 1994, there was one lawyer per 425 residents of Ontario. One may argue that the scope of work performed by a lawyer has increased along with the intricacies of living in a modern industrial society.

Table 4.1 shows the numbers of lawyers in the province, in Metropolitan Toronto and in the City of Toronto. The numbers relate to each of the five fiscal years from 1974 to 1994. It should be noted that a large number of qualified lawyers are working outside the province or are working in Ontario in non-traditional legal settings. For example, in 1994, 9,554 of the 27,242 qualified lawyers were either not practising law as a sole practitioner or with a law firm or were working outside the province. However, of the 8,032 lawyers in Ontario who do not appear to be practising law in a traditional manner, 2,391 are working in government.

¹⁸ Social Committee on Numbers of Lawyers. *The Report of The Special Committee on Numbers of Lawyers*, as reproduced in (1983) L.S.Gaz. 222 at 223.

TABLE 4.1 Numbers of Lawyers in Ontario and Metropolitan Toronto, 1974-1994^a

Category	Ontario	Metropolitan Toronto	City of Toronto
1974 Total lawyers	9,590	n/a	n/a
JULY 1979			
• Sole Practitioner	2,991	1,461	1,243
• Law Firm	7,006	3,506	3,202
• Government	958	524	480
• Education	158	69	36
• Other	1,225	827	666
• Retired/Not Working	406	197	148
Total lawyers	12,744	6,584	5,775
(Not in Ontario)	(498)		
(Total Lawyers)	13,242		
JULY 1984			
• Sole Practitioner	3,790	1,802	1,508
• Law Firm	8,180	4,352	4,005
• Government	1,378	662	619
• Education	197	74	38
• Other	1,483	1,056	870
• Retired/Not Working	1,248	650	499
Total lawyers	16,276	8,596	7,539
(Not in Ontario)	(715)		
(Total Lawyers)	16,991		
JULY 1989			
• Sole Practitioner	4,270	1,931	1,515
• Law Firm	10,437	5,768	5,347
• Government	1,762	873	813
• Education	200	65	33
• Other	2,317	1,568	1,275
• Retired/Not Working	1,553	809	617
Total lawyers	20,539	11,041	9,600
(Not in Ontario)	(871)		
(Total Lawyers)	(21,410)		
JULY 1994			
• Sole Practitioner	5,420	2,497	1,910
• Law Firm	12,268	6,072	5,631
• Government	2,391	1,155	1,041
• Education	233	83	48
• Other	3,049	2,036	1,654
• Retired/Not Working	2,359	1,168	879

^a Figures were kindly provided by the Law Society of Upper Canada. There are no available data on types of lawyer employment in the province prior to 1979.

Metropolitan Toronto includes: Cities of Toronto, Etobicoke, Scarborough, York, North York, and the Borough of East York.

Category	Ontario	Metropolitan Toronto	City of Toronto
Total lawyers	25,720	13,011	11,115
(Not in Ontario)	(1,522)		
(Total Lawyers)	(27,242)		

Table 4.2 provides the number of lawyers per capita for residents of Ontario.

TABLE 4.2 Number of Lawyers per Capita

Year	Number of Lawyers ¹⁹	Number of Ontario Residents	1 Lawyer per x residents
1974	9,590	8,222,900	857.4
1979	12,744	8,685,900	681.6
1984	16,276	9,206,200	565.6
1989	20,539	10,151,000	494.2
1994	25,720	10,927,800	425

4.1.2 Number of Judges

The number of judges in the province has steadily increased over the past 20 years. The numbers and analysis concentrate on the Ontario Court (General Division) and its predecessors, the District and County Courts and the Supreme Court of Ontario. These courts were the focus of our empirical studies in Toronto.

The County Judges Act, R.S.O. 1970 and the Judicature Act, R.S.O. 1970 provided for the number of judicial offices in both the County and District Courts and the Supreme Court. Regulations under the Courts of Justice Act, 1989 currently govern the number of judicial offices in the Ontario Court (General Division). These numbers, however, do not necessarily provide an accurate picture of the number of judges on the bench at any given moment. Some judicial positions may remain unfilled, there may be long term absence because of illness, appointment to royal commissions or other duties. Between the ages of 65 and 75, judges of the Ontario Court (General Division) can elect to hold office as a supernumerary judge meaning that they provide additional service to that provided by the current complement of that court.²⁰ In 1972, an amendment to the Judicature Act allowed a supernumerary position for each judge of the Supreme Court. The same amendment was made to the County Judges Act in 1976 creating one supernumerary position for each judge of the County and District Court.

Table 4.3 provides both an historical and current picture of the number of judges and supernumerary judges in the court(s) identified above. The figures for the years prior to 1970 are shown for historical interest but our focus is directed to the period 1973 to 1994.

¹⁹ Number of lawyers are the total number working in Ontario.

²⁰ See *Judges Act*. R.S.C., c. J-1, s. 29.

TABLE 4.3 Number of Judges in the County/District and Supreme Court 1930-1989 and the Ontario Court (General Division) 1990-1995^a

NUMBER OF FEDERALLY APPOINTED JUDGES ON THE BENCH IN ONTARIO (As at December 31st)						
YEAR	COURT	NUMBER OF JUDGES	CHIEF/ASSOCIATE CHIEF	SENIOR JUDGES	SUPERNUMERARIES	TOTAL
1930	Supreme Court	10	1	n/a	n/a	11
						74
	County/District Court	63	n/a	n/a	n/a	63
1940	Supreme Court	10	1	n/a	n/a	11
						74
	County/District Court	63	n/a	n/a	n/a	63
1950	Supreme Court	16	1	n/a	n/a	17
						77
	County/District Court	60	n/a	n/a	n/a	60
1960	Supreme Court	21	1	n/a	n/a	22
						91
	County/District Court	69	n/a	n/a	n/a	69
1970	Supreme Court	25	1	n/a	n/a	26
						119
	County/District Court	93	n/a	n/a	n/a	93
1973	Supreme Court	30	1	n/a	2	33
						136
	County/District Court	103	n/a	n/a	n/a	103
1974	Supreme Court	30	1	n/a	3	34
						137
	County/District Court	103	n/a	n/a	n/a	103

^a These figures were kindly provided by the Office of the Commissioner for Federal Judicial Affairs.

NUMBER OF FEDERALLY APPOINTED JUDGES ON THE BENCH IN ONTARIO (As at December 31st)						
YEAR	COURT	NUMBER OF JUDGES	CHIEF/ASSOCIATE CHIEF	SENIOR JUDGES	SUPERNUMERARIES	GRAND TOTAL
1978	Supreme Court	42	1	n/a	2	45
	County/District Court	124	1	n/a	8	133
1979	Supreme Court	42	2	n/a	2	46
	County/District Court	125	1	n/a	11	137
1983	Supreme Court	47	2	n/a	5	54
	County/District Court	141	1	n/a	19	161
1984	Supreme Court	47	2	n/a	5	54
	County/District Court	120	2	22	17	161 ^b
1988	Supreme Court	49	2	n/a	8	59
	County/District Court	117	2	22	27	168
1989	Supreme Court	48	2	n/a	10	60
	County/District Court	116	2	22	26	166
1993	Ontario Court (General Division)	193	2	9	51	255 ^c
1994	Ontario Court (General Division)	190	2	8	53	253

^b The total number of judges in the County/District Court now includes 21 senior judges and 1 senior judge of the Unified Family Court.

^c The total number of judicial offices includes 8 regional senior judges and 1 senior judge of the Unified Family Court.

4.1.3 Court Facilities

In 1994, there were 67 courtrooms used exclusively for Ontario Court (General Division) matters at various locations in downtown Toronto. In 1984, 53 courtrooms were used for the Supreme and District Courts in Toronto, and in 1974, 44 courtrooms were used by these same courts.²¹

4.1.4 Number of Boxes Stored

One of the perceptions about civil litigation is that individual cases are growing more complex and time-consuming and therefore, taking longer to proceed through the litigation process. This is believed to be caused by a number of factors, one of which is the number of motions dealing with related matters but not necessarily with the fundamental legal issue before the court. Delay and increased activity within a single case were two of the aspects this empirical study attempted to capture.

During the course of the empirical study we were able to examine files dating back to the 1960s.²² Files are stored in boxes located in various warehouses in Etobicoke and Mississauga. One possible indicator of an increase in length and complexity—or, at least, the amount of paper required to fuel a case—is to trace the number of files per box over the 20 year period.

Table 4.4 below provides a glimpse of the increase in the amount of paper used for civil matters. These numbers include the number of civil files and boxes for four of the fiscal years and includes all cases commenced by writ or statement of claim but does not include applications or other matters. The files originated from the Toronto court locations and the chart does not reflect the number of files nor the amount of space required to store files from any other Ontario court locations. The work on these files suggests that the boxes were as tightly packed in the 1970s as they were in the 1980s and 1990s. In the most general terms, we can see that the amount of space required to store court files has more than quadrupled in the last 20 years. There are no figures for 1993/94 as most of the files are still housed at their original court locations.

TABLE 4.4 Number of Civil Claims per Box Stored, 1973-1994

Fiscal Year	Number of Claims Filed	Number of Boxes of Claim Files Stored	Number of Claims Per Box Stored
1973/74	35,379	333	106.24
1978/79	37,066	929	39.90
1983/84	36,075	742	48.62
1988/89	41,871	1488	24.87
1993/94	Data not available		

²¹ Special thanks to Warren Dunlop, Program Development Branch, Courts Administration Division, Ministry of the Attorney General.

²² Some of the cases in the 1973/74 trial sample were filed in the latter part of the 1960s.

4.1.5 Increase in Technology

Closely related to the increase in the amount of paper stored in the court file is the issue of the use of information and document production technology. The twenty years covered by the study witnessed an evolution in the manner in which lawyers prepare and argue a case. First the photocopier, and later the personal computer and fax machine, have made the production of multiple copies of documents a necessary part of litigation.

As the potential for document production increased, the rules of civil procedure became more paper oriented. Thus, litigants must now produce an affidavit of documents in advance of discovery. Motion records, application records and books of authorities can and do clog the court files. Ironically, as the court file becomes fuller, it becomes less accessible to its most important user, the judiciary. In a vicious cycle, the judiciary must ask for compressed file contents in the form of trial records, in order to make sense of the file.

The citing of authority has also become a labour and paper intensive process. Years ago lawyers were not allowed to cite a case without bringing the bound copy of the decision to the courtroom. As photocopying increased, copies of complete judgements became acceptable, but no editing was permitted. Eventually, with the proliferation of authority available from computer reporting, judges were forced to request that counsel highlight the portions of the case upon which they were relying. Many of these books of authority remain in the file, and the same cases will be copied and distributed again the next time counsel has to argue a similar point.

4.2 LEGAL AID AND CRIMINAL JUSTICE SYSTEM

This section will examine briefly two other areas which may have an impact on the civil court system in Ontario. These areas are the amount of legal aid provided for civil applications over the past 20 years, as well as the volume of criminal litigation in the Ontario Court (General Division).

4.2.1 Legal Aid in Ontario

Legal aid monies are allocated for direct legal services (civil, criminal, administrative law), programme funding (e.g, Northern Legal Services and the Refugee Law Office in Ontario), as well as for central administrative expenses. Direct legal services are funded through the issuance of a certificate, which the client then takes to the lawyer of his or her choice.

Certificates must issue for indictable criminal matters under the terms of the Legal Aid Act. Certificates for some criminal matters and for all civil matters are discretionary. However, the majority of civil certificates are for family law matters. Of the 61,678 civil accounts paid in the 1993-94 fiscal year, 65.9% were for family law matters, and an additional 19% were for immigration matters. Only 14% of applications approved for civil matters involved the type of civil litigation in the courts which was examined in the file review, with the remaining cases covering appeals before administrative bodies.

This proportion has actually declined over the twenty year period of the study. In 1984 civil claims, including motor vehicle claims, made up 18% of the paid certificates. In 1974, these claims made up 16.2% of certificates.

4.2.2 Criminal Justice System

It is difficult to demonstrate in any precise manner how the criminal and civil justice systems affect one another. A large percentage of civil claims never proceed to trial, whereas a criminal charge requires a disposition in court, be it a guilty plea, charges dropped, or a trial. Essentially, the decision to proceed with a criminal charge is made prior to the matter being commenced in court whereas many civil claims are recorded but proceed no further than the initial filing stage. Of the 1,306,762 charges brought in Metropolitan Toronto in 1993 (which include highway traffic, criminal code, parking and narcotics offences, etc.), 99.41% were dealt with at the Provincial Court level. Many of the less serious matters (parking, highway traffic) do not require a court appearance. The remaining 0.59% were handled by the Ontario Court (General Division). The General Division caseload includes serious indictable offences and summary conviction appeals.

Table 4.5 traces the number of dispositions in the Ontario Court (General Division) in Metropolitan Toronto in both civil and criminal matters between 1989 and 1994. It should be noted that the Ontario Court (General Division) handles only Criminal Code and Narcotic Control Act offences, normally at the option of the accused or on appeal. The criminal dispositions record the disposition of criminal indictments which often includes more than one criminal charge. All civil dispositions both jury and non-jury (including motor vehicle, family law, divorce, and construction lien, etc) are included in Table 4.5, but neither criminal nor civil pre-trials are counted as dispositions. Divorce dispositions dropped dramatically in 1993 when procedural rules no longer required marital separation to be proven before a judge (4,797 dispositions in 1991/92 compared to 426 in 1992/93). Table 4.5 shows only a portion of the total numbers of criminal charges dealt with by the overall court system in Toronto but does include all civil and criminal dispositions in the Ontario Court (General Division). This may help to focus on whether the two - criminal justice and civil justice - are inter-related and interdependent and the continuous decline in dispositions in both areas of the law.

**TABLE 4.5 Civil versus Criminal Dispositions in the Ontario Court (General Division)
Toronto 1989-1994**

Year	Criminal dispositions	Civil dispositions
1989/90	4401	12,731
1990/91	4371	12,744
1991/92	3860	10,146
1992/93	3831	6,864
1993/94	3372	7,253

4.3 Population Growth and Economic Indicators

In an attempt to place the civil justice system within its broader social context, this section looks beyond the courthouse walls. Provided here is some background information on life in Ontario over the past 20 years, focusing on population numbers and various economic indicators. The population numbers trace growth in Toronto and Ontario while the economic indicators, including individual income, the cost of housing and cars, unemployment rates, interest and inflation rate fluctuations and gross domestic products, are provided for both Ontario and

Canada. Economic changes trace the health of the Ontario economy and provide a glimpse of the broader context in which the Ontario civil justice system operates.

4.3.1 Population

Ontario has seen a steady increase in its population over the last 20 years. This trend is particularly apparent in its urban centres, and, most specifically, in Toronto. Table 4.6 provides information regarding provincial and urban growth rates in Ontario between 1973 and 1994 as compared to Canada as a whole. In 1994, approximately 37% of Canada's population resided in the province of Ontario and 22% of Ontario residents resided in Metropolitan Toronto. The percentage of Canada's population living in Ontario grew slightly from 35.8% in 1973 to 36.1% in 1986.

TABLE 4.6 **Population Rates in Metropolitan Toronto, Ontario and Canada**
1973-1994 (expressed in 000's)*

YEAR	METROPOLITAN TORONTO	ONTARIO	CANADA
1973	n/a	8,094.4	22,559.5
1974	n/a	8,222.9	22,874.7
1975	n/a	8,338.1	23,209.2
1976	n/a	8,432.1	23,517.5
1977	n/a	8,525.6	23,796.4
1978	n/a	8,613.3	24,036.3
1979	n/a	8,685.9	24,276.9
1980	n/a	8,770.1	24,593.3
1981	n/a	8,837.8	24,900.0
1982	n/a	8,951.4	25,201.9
1983	n/a	9,073.4	25,456.3
1984	n/a	9,206.2	25,701.8
1985	n/a	9,334.4	25,941.6
1986	2,317.6	9,477.2	26,203.8
1987	2,349.5	9,684.9	26,549.7
1988	2,348.9	9,884.4	26,894.8
1989	2,379.4	10,151.0	27,379.3
1990	2,380.0	10,341.4	27,790.6
1991	2,362.4	10,471.5	28,120.1
1992	2,368.0	10,654.8	28,542.2
1993	2,384.5	10,813.2	28,940.6
1994	2,455.0	10,927.8	29,248.1

* Population data for Ontario and Canada 1973-1994 have been adjusted to reflect the inclusion of non-permanent residents and net census under-coverage. Adjusted population data for Metropolitan Toronto is only available for 1986-1994. SOURCE: Statistics Canada, Catalogue 91-213.

The increase in population in and around the greater Toronto area has affected population density. In turn, an increase in population density may lead to novel and complex litigation as the number and variety of potential relationships between individuals increases.

4.3.2 Average Income

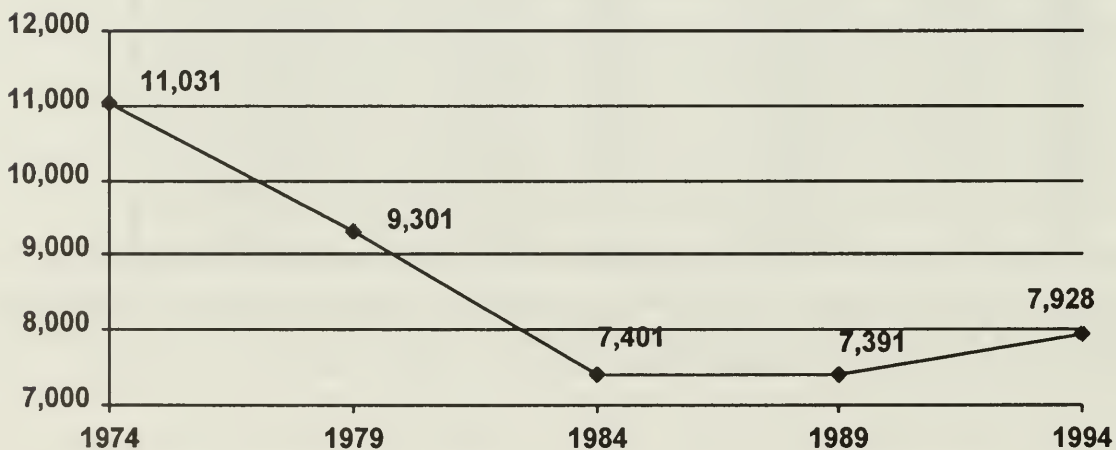
Although the average personal income for an individual has increased over the last 20 years, the value of that income has decreased in the same time period. Table 4.7 shows both the gross and disposable personal income for the average employed resident of Ontario since 1974. Disposable income is the income available after federal and provincial taxes have been deducted. Figure 4.1, on the other hand, provides an indication of the personal disposable income reflected in constant dollars, to factor out the effect of inflation on these figures.

Table 4.7 Average Gross and Real Personal Income in Ontario: 1974-1994

year	personal income (\$billion)	p. dispos. income (\$billion)	employed (000's)	av. p.i. (\$)	avg. p.d.i. (\$)
1974	48	38.8	3,523	13,617.02	11,013.34
1976	62.6	50.1	3,745	16,715.62	13,337.84
1978	75.8	62.3	3,962	19,131.75	15,724.38
1980	94.4	77.9	4,203	22,460.15	18,534.38
1982	121.1	98.5	4,244	28,534.4	23,209.24
1984	144.4	116.6	4,444	32,493.25	26,237.62
1986	169.3	133.0	4,772	35,477.78	27,870.91
1988	207.3	160.2	5,136	40,362.15	31,191.58
1990	23.8	182.5	5,226	45,694.60	34,921.55
1992	248	190	5,001	49,590.08	37,992.40
1994	257.9	197.6	5,160	49,980.62	38,294.57

SOURCE: Statistics Canada and Ontario Ministry of Finance

Figure 4.1 Value of a Sample Gross Salary, 1974-1994



SOURCE: Statistics Canada and Ontario Ministry of Finance

4.3.3 Cost of Housing and Motor Vehicles

There are a number of commodities for which the residents of Ontario tend to spend money, the most obvious being houses and automobiles. The cost of these two commodities in the twenty year period reviewed is set out in Table 4.8. The average income figures provided earlier have been reproduced in the row of Table 4.8 for comparison. These numbers will aid in understanding the cost of houses and cars in each year and the proportion of the average income necessary to acquire them. A number of assumptions have been made in order to provide the information in Table 4.8. In particular, it has been assumed that a single wage is available to each household. Although this may have predominantly held true in 1974, it can be assumed today that many households have more than one wage-earner. However, the value of wages has diminished over the twenty year period, and therefore, the differences between one or two salaries per household may not have as dramatic an effect in 1994 as it would have had in 1974.

TABLE 4.8 House and Automobile Prices, 1974-1994

	1973/74	1978/79	1983/84	1988/89	1993/94
Single-Family Home ^a	46,705.5	69,081.5	101,972.0	251,666.5	207,705.5
Popular Car ^b	4,900.0	6,900.0	6,500.0	10,600.0	14,500
Income ^c	\$11,013.34	\$15,724.38	\$26,273.62	\$31,191.58	\$38,294.57
Proportion: house ^d	\$4272.72/ year (38.8%)	\$5981.64/ year (38.0%)	\$10588.56/ yea (40.2%)	\$23188.68/ year (74.3%)	\$12800.64/ year (33.4%)
Proportion: car ^e	\$1727.52/ year (15.7%)	\$2394.12/year (15.2%)	\$2334.96/ year (8.8%)	\$3737.04/ year (11.9%)	\$4828.20/year (12.6%)

^a These prices are the average cost for a single family home in Toronto and are not representative of average house prices in the rest of Ontario. SOURCE: Canada Mortgage and Housing Corporation.

^b The prices represent the base price of the most popular GM car in each fiscal year. The Caprice was the most popular GM model in 1973/74 and 1978/79 and second most popular in 1983/84. By 1988/89, a smaller car, the Cavalier/Sunbird had become the most popular GM model. The following short table shows the sale volumes of the most popular mode and illustrate periods of economic depression in the car industry. SOURCE: General Motors of Canada Limited.

Year	Units Sold	Caprice - base price
1973/74	87,000 (Caprice)	\$4,900
1978/79	83,500 (Caprice)	\$6,900
1983/84	30,400 (Acadian)	\$10,800
1988/89	67,700 (Sunbird)	\$18,323
1993/94	66,800 (Sunbird)	\$25,472

^c Average personal income has been calculated by dividing the total personal income of Ontario with the number of employed. SOURCE: Statistics Canada and Ontario Ministry of Finance.

^d The following formula was used: average house price - 25% down payment amortized over 25 yrs @ 5 yr mortgage rate (fiscal year) = total payment per month x 12 months.

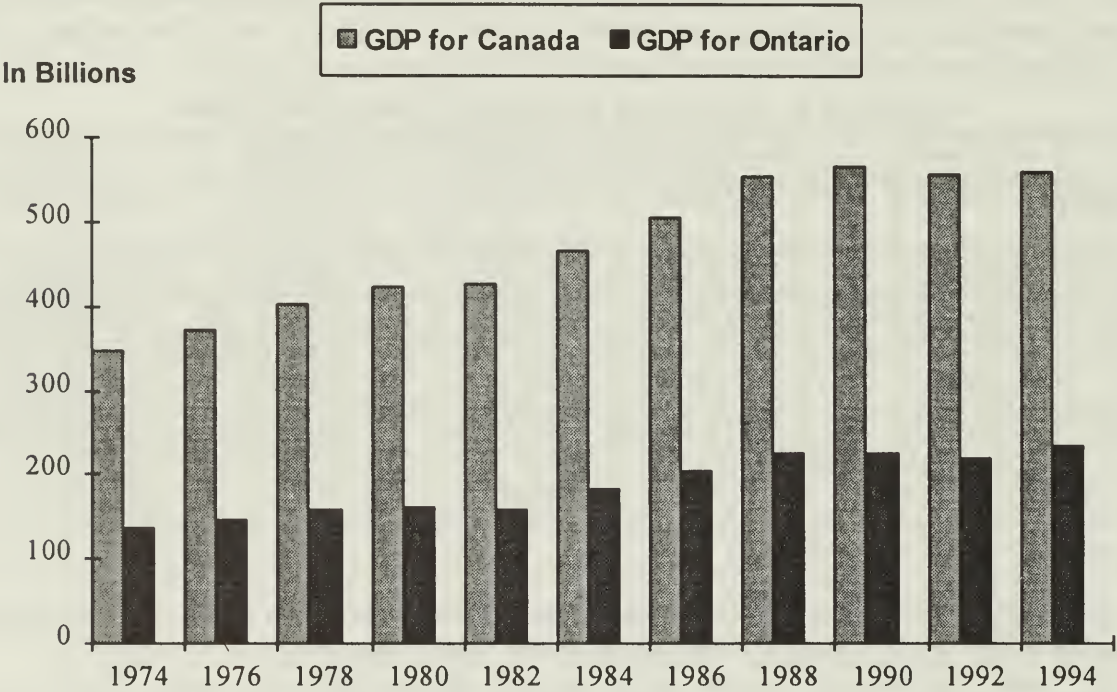
^e The following formula was used: average car price - 10% down payment amortized over 3 yrs @ prime rate (fiscal year) = total annual payment.

4.3.4 Interest, Inflation and Unemployment Rates, and the Gross Domestic Product

This section traces other economic indicators and provides some comparisons between Ontario and Canada, and in the case of unemployment rates, the Greater Toronto Area.

Figure 4.2 traces the real gross domestic product (GDP) of Ontario and Canada. These numbers illustrate the economic output of the province of Ontario as one of the most important producers of manufactured goods and services in Canada.

Figure 4.2 Real Gross Domestic Product of Ontario and Canada, 1974-1994



Error! Not a valid link.SOURCE: Statistics Canada and Ontario Ministry of Finance

Table 4.9 shows the unemployment rates in Canada, Ontario and the Greater Toronto Area. Although the province of Ontario contributes a large proportion to the nation’s economic wealth, it is likewise vulnerable in periods of economic recession. Ontario’s unemployment rates closely follow national trends and as can be seen in the mid-90s, its largest urban centre, Toronto, saw higher unemployment rates than the national average. This is particularly interesting because a higher than average unemployment rate is a rare phenomenon in Ontario than it is in other provinces with less economic wealth.

TABLE 4.9 Unemployment Rates for the Greater Toronto Area, Ontario and Canada, 1974-1994

YEAR	GTA(%)	ONT(%)	CAN(%)
1974	N/A	4.4	N/A
1976	N/A	6.2	7.2
1978	N/A	7.2	8.4
1980	N/A	6.9	7.5
1982	8.1	9.7	11.0
1984	7.8	9.0	11.2
1986	5.5	7.0	9.5
1988	3.7	5.0	7.8
1990	5.3	6.0	8.1
1992	11.4	10.8	11.3
1994	10.9	9.9	9.8

SOURCE: Statistics Canada and Ontario Ministry of Finance

The last table included in this section, Table 4.10, traces the prime interest rate as well as inflation rate through the Consumer Price Index (CPI) for both Ontario and Canada. Inflation is often followed by high interest rates designed to slow economic growth. Interest rates which had risen steadily throughout the late 1980s and early 1990s only fell dramatically after Ontario experienced a decline in its real GDP of nearly 8% at the beginning of 1990.

TABLE 4.10 Interest/Inflation Rates for Ontario and Canada, 1974-1994

YEAR	PRIME RATE (%)	ONT CPI (%)	CAN CPI (%)
1974	10.8	N/A	10.8
1976	10.0	N/A	8.0
1978	9.7	N/A	9.1
1980	14.3	12.0	12.4
1982	15.8	10.7	10.9
1984	12.1	4.9	4.4
1986	10.5	4.4	4.2
1988	10.8	4.7	4.0
1990	14.1	4.8	4.8
1992	7.5	1.1	1.5
1994	6.9	0.1	0.2

SOURCE: Statistics Canada and Ontario Ministry of Finance

4.4 Conclusion

It is clear from this brief examination of possible influences on the civil justice system of Ontario that it is difficult to be certain of the degree to which each element has a direct effect or to what extent each is influenced in turn by other factors.

The Ontario economy has fluctuated over the past twenty years and like the rest of Canada, has experienced a deep and prolonged recession in the first half of the 1990s. It is not always easy to trace a direct link between periods of economic recession and increased use of the civil courts since there are always other factors involved. The extent to which these factors mute or exacerbate the number of civil claims in times of expansion and recession is unknown. It is impossible to determine, for example, if the number of lawyers create legal demand that would not otherwise exist if there were fewer lawyers or if the intricacies of modern relationships are the true source of the increasing demand on the court system. Likewise, it may be argued that although the demand for legal services may be increasing, such an increase is to be expected and is reasonable, given the increasing number and permutations of possible relationships within our society. Others may argue that in order to deal with the increased demand, new and varied services, other than the courts, must be explored.

This section has provided some information regarding the court system and the external environment in which it operates. Each element may provide a clue as to the forces shaping the civil justice system in Ontario.

5.0 WHAT IS THE TYPICAL CIVIL CASE?

Summary of this Section

- *Collection cases form the largest category of cases commenced but the proportion which proceed to trial drops dramatically.*
- *Negligence cases form a greater portion of the trial sample than in the commencement sample.*
- *Contract/commercial cases increase in the trial sample but not as sharply as negligence cases. Property cases drop as a proportion of the trial sample.*
- *In the commencement survey, negligence cases (excluding motor vehicle) and property cases increased in 1993/94. Motor vehicle cases showed a dramatic decline.*
- *The frequency of pleadings with a statutory basis in the commencement survey increased in the 20 year period. Overall, the percentage of cases with a statutory basis in the pleadings was 14.2% in the commencement study. The trial sample revealed 17.1% of cases with statutory basis.*
- *The 20 year average of monetary claims was \$255,520 in the trial study and \$250,734 in the commencement study. The respective median claims were \$15,883 and \$9,654.*
- *In the commencement study 84.3% of cases had one plaintiff, 10.9% had two. In the trial study the results were 78.4% - one plaintiff and 15.8% - two plaintiffs.*
- *In the trial and commencement studies 55% of cases had one defendant and 30% had two defendants. With the exception of 1988/89, the multiplicity of litigants has not varied over the 20 year period.*
- *Seventy to eighty percent of plaintiffs are banks, corporations and institutions. Over 50% of defendants are individuals.*

- *In the commencement survey 68.5% of cases were based on a business relationship and 24.5% were personal. In the trial sample, personal relationship cases rose to 38.6% with a 20 year high in 1973/74 of 62.3%.*
- *The length of relationship of the parties can predict the likelihood of a case going to trial. One time relationships were more likely to result in a trial than those of a six month or longer duration. Long term relationship cases were more likely to be business cases as opposed to negligence or personal cases.*

5.1 INTRODUCTION

This section will explore survey results from both the commencement and trial studies to consider case types, the number and nature of litigants, the relationships between litigants, the statutory basis of claims and the monetary amount of claims. An important part of both surveys was to obtain a profile of litigants. This profile will include answers to the following questions. How many plaintiffs and defendants are named in a typical lawsuit? What is the relationship between the litigants? What is the nature and monetary amount of the claim being advanced? Answers to these questions are important to obtain a comprehensive understanding of the nature of civil litigation.

5.2 CASE TYPES

A crucial goal in both surveys was to determine the types of claims being brought and the types of claims which ultimately proceed to trial. The case type was usually identified clearly on the statement of claim and prior to 1985 the writ of summons. There was a limited number of times, however, when the reviewer had to choose the case type from multiple claims arising from a single incident or a problem extending over time. Some claims revealed a series of case types, but it was rare that the primary case type did not stand out. A summary of the case types found in the commencement and trial studies is set out in Table 5.1.

TABLE 5.1 Case Types in the Trial and Commencement Studies

CASE TYPE	COMMENCEMENT SURVEY		TRIAL SURVEY	
	Number	% of Survey	Number	% of Survey
Collection	810	37.4	238	18.0
Motor Vehicle	364	16.8	403	30.5
Real Property	311	14.4	149	11.3
Contract/Commercial	207	9.6	140	10.6
Other Negligence	103	4.8	137	10.4
Motor Vehicle/Family Law	99	4.6	22	1.7
Wrongful Dismissal	62	2.9	76	5.8
Construction/Mechanics Lien	54	2.5	4	0.3
Negligence/Contract	41	1.9	48	3.6
Other Contract	32	1.5	58	4.4
Landlord Tenant	26	1.2	8	0.6
Trust/Fiduciary duties	26	1.2	12	0.9
Medical/Professional Malpractice	26	1.2	23	1.7
Estates	3	0.1	2	0.2
Bankruptcy	1	0.0	0	0.0
TOTALS	2165	100.0	1320	100.0

In interpreting the data produced from each survey, it becomes clear that certain types of claims are commonly made whereas others are rarely the basis of a complaint. An attempt was made to identify changes over 20 years in the frequency of certain types of claims most commonly cited and the difference between the most frequent type of claims commenced and the type of case which actually proceeds to trial. The most noticeable trend involved motor vehicle claims. These claims formed a large proportion of claims made prior to 1990 but were drastically reduced in number with the introduction of the "no-fault" car insurance scheme.

It is important to have the capability to identify as many case types as possible. A small number of case type categories does not allow much analysis of trends within the system. It may well be that more should be done to break out certain categories of cases. For instance, in the other negligence cases it may be possible to distinguish between slip and fall cases and intentional torts such as copyright infringement. In the collection area there may be those who would want to know more about cases involving the sales of goods, promissory note defaults or other claims for liquidated damages. Similar comments would be made about contract/commercial cases and motor vehicle cases. A large number of case categories allows for very sensitive and flexible tracking of civil litigation trends.

For purposes of this paper it was decided to divide the caseloads into five broader case categories. The five categories which will be used are:

1. Collection – The definition of collection cases is included in Appendix 2. There were so many cases categorized in this area it was considered useful to keep this category separate.
2. Contract – This category includes all cases collected under the following case types: contract/commercial, construction/mechanics liens, bankruptcy, wrongful dismissal, other contract.
3. Property – Included in this category are real property, landlord tenant, estates and trust/fiduciary duty cases.
4. Negligence – This includes medical/professional malpractice, negligence/contract and other negligence cases.
5. Motor Vehicle – Includes cases categorized as motor vehicle and motor vehicle/family law.

Categories 4 and 5 could have been merged under one heading. Most studies of tort litigation includes these types of cases in one category. There will be some occasions when these categories will be merged for purposes of comparison to other tort litigation studies. Separation of the categories was thought to be useful however because of the dramatic decline in motor vehicle litigation after 1990 which has already been mentioned. Categories 1 and 2 may also be usefully combined for some purposes.

In the 20 year period covered by the surveys, debt collection represented 37.4% of all claims commenced but only 18% of the trial sample. Motor vehicle claims, at 16.8%, constituted the second largest portion of the commencement survey and represented 30.5% of the trial sample. A breakdown of the five cases types for both surveys is set out in table below:

TABLE 5.2 Five Major Categories of Case Types in the Commencement and Trial Studies

CASE TYPES	COMMENCEMENT % OF SAMPLE	TRIAL % OF SAMPLE
Negligence	7.9	15.8
Collection	37.4	18
Contract/Commercial	16.4	21.1
Property/Other	16.9	13
Motor Vehicle	21.4	32.2

Some general conclusions can be drawn from this table:

- Collection cases form the largest percentage of cases commenced but the proportion of cases in this category going to trial drops dramatically. This is not surprising since many of these cases are for liquidated amounts of money and rarely raise any other collateral issues. The data below will also show that these cases are less frequently defended.
- Contract/commercial cases represent about 16.4% of cases commenced and 21.1% of cases tried. While this increase may seem large, it must be considered in light of the dramatic drop in collection cases at the trial stage. It would appear that business cases do not go to trial as often as negligence cases.
- Motor vehicle and negligence form a significant portion of cases commenced (29.3%) and an ever larger percentage of cases which go to trial (48%). This suggests that issues of liability and the assessment of damages may be more difficult in tort cases than in contract matters.

An analysis of case types in the five fiscal year periods provides an insight into the frequency of case types over time. As mentioned earlier, the number of motor vehicle claims has drastically diminished. In 1973/74, motor vehicle claims represented 26.3% of all the claims commenced for the year, 31.5% of claims in 1988/89 and only 9.0% of all 1993/94 claims. On the other hand, other negligence cases which include "slip and fall", conspiracy to defraud and personal injury, varied between 4.2% and 8.5% in the first four fiscal periods before jumping to 15.0% of claims in 1993/94. The result for motor vehicle cases is similar in the trial sample. Motor vehicle cases represented 56.7% of trials in 1973/74, and by 1993/94 this had been reduced to 21.0% of trials. This latter percentage can be expected to decline further as motor vehicles trial commenced prior to 1990 work their way out of the system. Trials involving disputes over real property have steadily increased since 1973/74 and in 1993/94 represented 21% of all trials. Full details of this analysis are set out in Tables 5.3 and 5.4.

TABLE 5.3 Major Case Types by Fiscal Year for Commencement Survey

FISCAL YEARS	CASE TYPES				
	Negligence	Collection	Contract	Property	Motor Vehicle
73-74	4.2%	44.1%	11.5%	13.8%	26.3%
78-79	5.7	42.9	18.1	15.4	17.9
83-84	8.5	35.4	17.7	15.4	23.1
88-89	6.1	30.1	18.5	13.8	31.5
93-94	15.0	33.6	16.4	26.0	9.0

TABLE 5.4 Major Case Type by Fiscal Year for Trial Survey

FISCAL YEARS	CASE TYPES				
	Negligence	Collection	Contract	Property	Motor Vehicle
73-74	11.2%	9.0%	19.0%	4.1%	56.7%
78-79	15.2	25.3	17.2	9.1	33.3
83-84	20.7	18.1	21.9	17.2	24.4
88-89	20.2	13.7	25.3	17.2	23.6
93-94	11.9	23.0	23.0	21.0	21.0

Debt collection claims do not seem to stay in the court system for trial at as high a rate. From 1973/74 to 1993/94, debt collection cases continuously represent 30 to 45% of all cases commenced. Debt collection trials, however, appear to fluctuate more dramatically and may reflect periods of economic recession. Between 1973/74 and 1978/79, collection trials increased from 9.0% of the yearly caseload to 25.3%, and between 1988/89 and 1993/94, the percentage of collection trials rose from 13.7% of the yearly caseload to 23%.

5.3 STATUTORY BASIS OF CLAIMS

In both the trial and commencement surveys, researchers recorded the pleading of specific statutory rights and remedies. The pleading of statutes was noted only for claims advanced by plaintiffs. Defendants' pleading of statute was noted but not recorded, since it was assumed that defences to a statutory right would require a pleading of the same statute. The exception to this assumption was the reliance by defendants upon the *Negligence Act* in motor vehicle cases to claim contribution and relief against other defendants.

The first major finding about the use of statutes in civil claims is that only a small proportion of civil pleadings have a statutory basis: one out of seven cases (14.2%) in the commencement study, and one out of six cases (17.2%) in the trial study. While the proportion of cases in the commencement study with statutorily-based pleadings has increased over the past twenty years, the proportion of cases in the trial study has remained relatively stable. These findings are set out in Table 5.5.

TABLE 5.5 Frequency of Pleadings with Statutory Basis, by Year

Sample	Year					Totals
	73/74	78/79	83/84	88/89	93/94	
Commencement Study	30	42	40	109	87	308 of 2166
Trial Study	62	21	49	45	50	226 of 1320

The data in Table 5.5 do not necessarily indicate that new types of claims are being made or that new statutes are being cited. It may be only that appropriate statutes are being more clearly identified in traditional claims. Table 5.6 identifies the specific statutes in the civil pleadings examined in the commencement and trial studies. The table includes every provincial statute used at least four times by itself in either sample, or at least eight times in conjunction with other statutes in either sample. Only 13 statutes met either of these criteria, and in two cases, one of

the statutes replaced an earlier one (the *Construction Lien Act* replaced the *Mechanics Lien Act*, and the *Family Law Act* replaced the *Family Law Reform Act*).

TABLE 5.6 Frequency of Pleadings with Statutory Basis, by Statute

Statute	Commencement Study		Trial Study		Total
	Alone	With Others	Alone	With Others	
<i>Highway Traffic Act</i>	69	26	71	29	195
<i>Family Law Act</i>	44	18	23	8	93
<i>Mechanics' Lien Act</i>	20	1	0	0	21
<i>Insurance Act</i>	19	10	11	12	52
<i>Construction Lien Act</i>	13	1	3	0	17
<i>Mortgages Act</i>	8	0	1	0	9
<i>Sale of Goods Act</i>	6	1	5	2	14
<i>Landlord and Tenant Act</i>	6	2	3	1	12
<i>Occupier's Liability Act</i>	4	8	6	5	23
<i>Fraudulent Conveyances Act</i>	4	6	2	2	14
<i>Fatal Accidents Act</i>	1	2	4	8	15
<i>Negligence Act</i>	0	32	0	14	46
<i>Family Law Reform Act</i>	0	8	0	10	18

With exception of the *Family Law Act* and its predecessor *Family Law Reform Act*, the principal statutes pleaded in civil statements of claim are the more "traditional" ones. It may be that the impact of new legislation has been more dramatically reflected in an increased number of cases commenced by way of application after 1985, but this supposition would require additional research to assess. The data from our two studies, as shown in Table 5.6, show that new causes of action created by the provincial legislature do not account for increased civil litigation. This contrasts to the perception held by some that legislative initiatives have increased the pressure of caseloads in our civil courts. Over 80% of the cases in both the commencement and trial studies do not plead statute law but rely instead upon common law as the basis for the claim.

5.4 MONETARY AMOUNT OF CLAIMS

As most litigants know, the amount requested is not always the amount awarded or the amount eventually obtained from the judgment debtor. Table 5.7 sets out the amounts of monetary claims advanced by plaintiffs in terms of the mean, median, quartiles and deciles.

TABLE 5.7 The Amount of Monetary Claims by Plaintiffs in the Commencement and Trial Study*

	COMMENCEMENT STUDY	TRIAL STUDY
Mean	250,734	255,320
Median	9,654	15,883
Quartiles 1	1,724	3,900
2	9,643	15,767
3	63,644	91,779
Deciles 1	0	1,000
2	1,182	2,678
3	2,431	5,000
4	5,000	9,435
5	9,643	15,767
6	18,296	30,000
7	40,000	61,589
8	104,920	150,000
9	250,000	328,248

**Note: All figures expressed in dollars.*

The median provides a measure of central tendency such that half of the sample will be above it and half of the sample will be below it. This is particularly useful for skewed distributions. The arithmetic mean, frequently referred to as the “average” is the sum of all of the values for the cases divided by the number of cases. In Table 5.7, the median for the commencement study is under \$10,000, and the trial study under \$16,000, even though the means are each over a quarter of a million dollars. Thus the mean emphasizes the effect of a small number of high-dollar claims, while the two medians suggest that regardless of the cost of litigation, half the civil claims filed in Toronto seek awards whose worth would be substantially reduced if the matter proceeded through motions, pretrial and trial.

Quartiles and deciles divide the sample distribution into four or ten groups of an equal number of cases. Thus for example, the first quartile in the trial study is \$3,900, meaning that the lowest 25% of civil claims that went to trial were for amounts of \$3,900 or less. As another example, the sixth decile of the trial study is \$30,000, meaning that 60% of the civil claims that went to trial were for amounts under \$30,000 (and conversely, 40% were for amounts over \$30,000). Quartiles and deciles are useful because they focus on cases away from the centre of the distribution; they are important here because they highlight the number of cases with low dollar claims and high dollar claims. The figures in Table 5.7 do not fit on a normal (or bell) curve. Dollar amounts double from one decile to the next.

Table 5.8 reports the same information in a different form, showing the number of cases in different monetary categories. The table shows that commenced cases were more likely to have no monetary claim (12.9%) than cases tried (3.5%), and cases tried included a greater proportion of claims over \$250,000 (13.8% compared with 10.4%) than cases commenced. Taken together, the two tables show that cases reaching trial involve larger claims.

TABLE 5.8 Number of Cases in Different Monetary Claims Categories in the Commencement and Trial Studies

	COMMENCEMENT STUDY	% OF STUDY	TRIAL STUDY	% OF TRIAL SAMPLE
No. Amount Claimed	278	12.9%	46	3.5%
< \$10,000	796	37.2%	489	37.1%
\$10,000-\$99,999	603	28.2%	458	34.7%
\$100,000-\$248,000	242	11.3%	144	10.9%
> \$250,000	223	10.4%	182	13.8%
Total Cases	2,142	100.0%	1,319	100.0%

Further analysis of the monetary amounts claimed could be obtained by analyzing by fiscal year or by case type. Another analysis might include a review of amounts awarded by the courts.

5.5 PROFILE OF LITIGANTS IN CIVIL LITIGATION

This part of the study will construct a profile of litigants in terms of the following characteristics:

- Multiplicity of plaintiffs and defendants – The data will reveal the number of plaintiffs and defendants in all cases and in terms of case type. There is an underlying assumption that the multiplicity of litigants may contribute to case complexity and delay.
- Type of Litigant – The surveys categorized litigants by whether they were individuals; corporations, partnerships or proprietorships; government/institutional; or banks/ trust companies/credit unions. The frequency of appearance of these types of litigants will be presented.
- Relationship between Litigants – Reviewers were asked to assess the relationship between plaintiffs and defendants as either business, personal, professional, government/institutional or other. Relationships were also assessed in terms of the length of time the relationship had existed. The categories were one time, less than 6 months or greater than 6 months.

5.5.1 Multiplicity of Plaintiffs and Defendants

The Plaintiffs

Table 5.9 shows the number of plaintiffs involved in individual civil cases commenced over the past 10 years. In the commencement study 84.3% of cases have one plaintiff only and another 10.9% have two plaintiffs. Therefore, 95.2% of cases will have one or two plaintiffs. More will be said about this factor as an indicator of case complexity.

There was a difference in the multiplicity of plaintiffs in the trial and commencement studies. The trial study shows that 78.4% of cases that went to trial have one plaintiff and 15.8% have two.

The figures in Table 5.9 suggest that a somewhat higher proportion of cases with two or three plaintiffs reach the trial stage. At the same time, however, cases with four or five or more plaintiffs make up a similarly small proportion of the trial sample (38 out of 1320 cases, or 2.88%) and the commencement sample (57 out of 2166, or 2.63%).

TABLE 5.9 Plaintiffs Per Case in the Commencement and Trial Studies

# of Plaintiffs per case	COMMENCEMENT STUDY	TRIAL STUDY
1	1825 (84.3%)	1035 (78.4%)
2	237 (10.9%)	208 (15.8%)
3	47 (2.2%)	39 (3.0%)
4	27 (1.2%)	18 (1.4%)
5 or more	30 (1.4%)	20 (1.4%)
Total	2166 (100.0%)	1320 (100.0%)

The Defendants

More defendants are named in each case than plaintiffs. Only 54.5% of cases in the commencement sample contained a single defendant, 30.4% had two defendants and 7.6% had three. Another 4.1% had four defendants. This suggests that the most common civil lawsuit commenced in this court is one in which there is one plaintiff and one or two defendants.

The number of defendants per case in the trial study was almost identical to the number found in the commencement survey. The summary in Table 5.10 indicates that 55% of the cases had one defendant and 29.2% had two defendants.

TABLE 5.10 Defendants Per Case in the Commencement and Trial Studies

# of Defendants per case	COMMENCEMENT STUDY	TRIAL STUDY
1	1176 (54.5%)	726 (55.0%)
2	656 (30.4%)	385 (29.2%)
3	164 (7.6%)	103 (7.8%)
4	89 (4.1%)	50 (3.8%)
5 or more	71 (3.4%)	56 (4.4%)
Total	2156 (100.0%)	1320 (100.0%)

Both the commencement sample and the trial sample show an increase in multiple plaintiffs in 1988-89. Cases commenced by two or more plaintiffs had begun to increase in 1983-84. In the sample of cases tried, no trend was visible in the first three fiscal year periods. There was a noticeable increase in multiple plaintiffs in 1988-89 trials; however, the proportion of multiple plaintiffs had dropped by 1993-94. In the commencement sample, percentages of multiple plaintiffs remained higher than 1983-84. These findings are set out in Tables 5.11 and 5.12.

TABLE 5.11 Multiplicity of Plaintiffs by Fiscal Year in the Commencement Study

	COMMENCEMENT STUDY				
# of Plaintiffs	73/74	78/79	83/84	88/89	93/94
1	89.2%	90.1%	83.8%	73.8%	83.4%
2	8.0%	8.0%	13.6%	16.1%	9.7%
3	1.2%	1.2%	2.1%	4.0%	2.5%
4	1.4%	.2%	.3%	3.0%	1.4%
5 or more	.2%	.4%	.3%	3.0%	3.0%

TABLE 5.12 Multiplicity of Plaintiffs by Fiscal Year in the Trial Study

	TRIAL STUDY				
# of Plaintiffs	73/74	78/79	83/84	88/89	93/94
1	82.5%	83.8%	81.5%	66.1%	75.8%
2	13.4%	13.1%	13.0%	25.8%	15.1%
3	2.2%	1.3%	3.0%	3.9%	4.8%
4	.7%	1.0%	.7%	2.6%	2.0%
5 or more	1.2%	.6%	1.9%	1.7%	2.4%

5.2. Types of Litigants

Data on the type of plaintiff in the commencement study shows some interesting findings. In cases with a single plaintiff (i.e. 84.3% of cases) corporations, banks, trust companies and proprietorships comprised 66.6% of the caseload. Government/institutional plaintiffs represented only 1.7% and individuals were 31.7%. A 1982 study of small claims court litigants in Toronto found that corporations, banks and institutions were plaintiffs in 81.27% of the cases in that court.²³ The percent of individuals increased from 18% to approximately 40% when multiple plaintiffs are included. The figure rises because many cases include two or more individuals as plaintiffs and to a far lesser extent individuals in combination with partnerships, corporations or governments.

In the commencement study individuals appear more often as defendants than as plaintiffs. In the single defendant category 54.8% of defendants are individuals compared to 31.7% of individuals as plaintiffs in the single plaintiff category. The trend does not vary when all defendant combinations are considered. The data reveal that the most significant frequencies of defendant types are multiple individuals 51.2%, multiple corporations 23.7% and individuals/corporations 13.8%.

In the trial study cases, single plaintiffs were reviewed to determine the type of litigant. In contrast to the commencement study, individuals increased from approximately 31% to 55.2% of single plaintiffs who went to trial. Corporations were represented as a single plaintiff in 37.1% of cases that went to trial, down from 41.8% of the single plaintiffs when the cases began. Banks dropped from 1.8% of the commencement study to 4.4% in the trial study.

There was not much variation in the type of defendant in cases with only one defendant as between the commencement and trial study. Approximately 58% of defendants were individuals and 42% were

²³ *Supra*, note 9 at 22.

corporations, banks and partnerships. Where a case had more than one defendant, individuals comprised 48.0%, corporations 23.7%, individuals and corporations 17.5% and the balance of cases had differing combinations.

5.5.3. Relationships between Litigants

The relationship between plaintiffs and defendants was analyzed according to two variables: the type of relationship (business, personal, etc.) and the length of the relationship (one time, less than 6 months or greater than 6 months).

The finding in the commencement study is that 68.5% (1485) of the cases involved a business relationship and 24.2% (525) were categorized as personal. While these numbers varied between fiscal years the variances are not noteworthy. The one exception is the decline in personal relationships in 1993/94 caused by the introduction of no-fault auto insurance.

Business relationships decreased in the trial sample in comparison to the commencement survey from 68.5% to 54.8%. Personal relationships increased from 24.7% to 38.6% of the sample in the trial study. A breakdown for each fiscal period is set out in Table 5.13 below.

The mix of cases tried in the first fiscal period, 1973-74, was quite different from that of any subsequent period, as personal rather than business relationships dominated the 268 cases tried. In the next three fiscal periods, the mix was reversed. Most recently, in 1993-94, that change was accentuated by a further shift that may reflect the gradual reduction of motor vehicle accident trials as the effect of no-fault insurance is felt in the Toronto courts.

While the prevalence of business relationships in the sample of cases commenced was expected, given the number of liquidated debt cases (many of which proceed by default judgment), the proportion of business relationships in cases tried was larger than that expected, and is growing.

TABLE 5.13 Type of Relationship Between Litigants by Fiscal Year in the Trial Study

Relationships	73/74	78/79	83/84	88/89	93/94	Total
Business	94 35.1%	170 57.2%	166 61.5%	133 57.1%	161 63.9%	724 54.8%
Personal	167 62.3%	112 37.7%	82 30.4%	81 34.8%	68 27.0%	510 38.6%
Professional	4 1.5%	8 2.7%	17 6.3%	10 4.3%	14 5.6%	53 4.02%
Government/ Institutional	2 .7%	3 1.0%	2 .7%	2 .9%	3 1.2%	12 .91%
Other	1 .4%	4 1.3%	3 1.1%	7 3.0%	6 2.4%	21 1.6%
Total	268	297	270	233	252	1320

While business relationship cases dropped as a percentage of the sample in the trial study, the proportion of business relationship cases that could be said to be one time and short term was higher in the trial sample than in the commencement sample. These numbers are illustrated below in Table 5.14.

TABLE 5.14 Length of Relationships in Business Cases in the Commencement and Trial Studies

	ONE TIME		SHORT TERM		LONG TERM		NOT KNOWN		TOTAL
Commencement Study	274	18.5%	460	31.0%	694	46.8%	55	3.7%	1483
Trial Study	214	29.6%	221	30.5%	285	39.4%	4	.6%	724

6.0 WHAT HAPPENS TO THE TYPICAL CIVIL CASE?

Summary of this Section

- *The defence rate in the 20 year period is about 35%.*
- *4.4% of cases in the commencement study had 2 defences while 9.8% in the trial sample had 2 defences. The number of separately represented defendants appears to be an indicator that a trial may occur.*
- *The defence rate has risen in the 20 year period from a low of 24.7% to a high of approximately 40%.*
- *The percentage of damage assessments has steadily declined between 1973 and 1994.*
- *Motions occur in 50% of cases. In 1973/74, 7% of the trial sample had 5 or more motions. This increased to 41.2% in 1988/89 and dropped to 22.7% in 1993/94. The percentage of cases in the trial sample which had at least one motion increased from 66% to 91.3% in the twenty year period.*
- *Motion activity in the commencement survey did not increase over time. The occurrence and multiplicity of motions appear to reflect the likelihood of trial.*
- *A case with a counterclaim, crossclaim or third party action is more likely to take longer and to result in a trial.*
- *In the commencement survey 31.8% of cases contained no disposition, 10.3% were discontinued, 21.6% were settled, 3.7% were dismissed, 28.3% had a default judgment, 3.5% went to trial and 0.8% had a partial trial.*
- *65.9% of cases that resulted in a trial contained an order for the plaintiff, 16.4% were dismissed and the balance of 17.7% were settled.*
- *The pace of litigation continually slowed over the 20 year period in both the commencement and trial study.*
- *In the commencement survey, business relationship cases are faster. The type of relationship does not seem to have affected the pace of litigation in the trial study.*
- *The median time to disposition for jury trials is somewhat slower than non-jury trials but the 90th percentile of jury trials are faster than non-jury cases.*

6.1 INTRODUCTION

This section will consider the various paths that civil cases take once they have been commenced. Included in this section are figures about the defence rate, the number of motions, and the frequency of counterclaims, crossclaims and third party claims. We will then consider the various types of dispositions from default judgment to trial. Finally, there will be a report on the pace of civil litigation.

6.2 DEFENCE RATE

Understanding how the justice system is used requires an examination not only of who makes claims and against whom, but also how many claims are defended. Analyzing defence rates presumes that cases which are not defended use little public resources and may even generate income through filing and other court fees. Cases that are defended use more public resources the further into the system they proceed.

The surveys reveal that a clear majority of claims are undefended. Of the 2166 claims reviewed in the commencement sample, 1413 files (65.2%) did not contain a statement of defence. This indicates that for all claims initiated, just under 35% were defended. These results are summarized in Table 6.1.

As might be expected the defence rate in the trial sample was different. However, even here 14% of cases had no statement of defence. Cases that were undefended in the trial study were assessments of damages, in which a plaintiff would have received default judgement except for having to prove damages; while these were common in the 1970's, they have virtually disappeared today (see Table 6.3).

TABLE 6.1 Defence Rate in the Commencement and Trial Study

NO. OF DEFENCES FILED	COMMENCEMENT STUDY		TRIAL STUDY	
0	413	65.2%	95	14.8%
1	635	29.3%	966	73.2%
2	95	4.4%	129	9.8%
3	16	.7%	16	1.2%
4	6	.3%	11	.8%
5 or more	1	.0%	3	.2%
Total	2166	100.0%	1320	100.0%

In Tables 6.2 and 6.3, the defence rate is broken down into the five fiscal years. These tables show a substantial increase in the defence rate in the commencement study over time from a low of 25% in 1973/74 to a high of 40% in 1988/89 and 1993/94. This increase is particularly interesting, both because it has occurred consistently and gradually during the first four fiscal years, from 24.8% in 1973-74 to a high of 40.9% in 1988/89, and because it has remained at almost the same level (39.9%) in 1993/94, even though no-fault auto insurance has substantially reduced the proportion of auto accident cases. These latter cases which would be expected to have a higher defence rate than collection cases.

TABLE 6.2 Defence Rate by Fiscal Year in the Commencement Study

No. of Defences	73/74	78/79	83/84	88/89	93/94	Totals
0	321 (75.2%)	325 (66.7%)	253 (64.9%)	253 (59.1%)	261 (60.1%)	1413
1	95 (22.2%)	136 (27.9%)	115 (29.5%)	146 (34.1%)	143 (32.9%)	635
2	10 (2.3%)	18 (3.7%)	15 (3.8%)	27 (6.3%)	25 (5.8%)	95
3	0	5 (1.0%)	5 (1.3%)	2 (.5%)	4 (.9%)	16
4	1 (.2%)	3 (.6%)	2 (.5%)	0	0	6
5	0	0	0	0	1 (.2%)	1
Totals	427 (100.0%)	487 (100.0%)	390 (100.0%)	428 (100.0%)	434 (100.0%)	2166

A similar pattern is visible in the trial sample. Undefended cases made up 38.1% of trials in the 1973/74 sample, but only 2% of 252 cases in 1993/94 trial sample.

TABLE 6.3 Defence Rate by Fiscal Year in the Trial Study

No. of Defences	73/74	78/79	83/84	88/89	93/94	Totals
0	102 (38.1%)	40 (13.5%)	46 (17.0%)	5 (2.1%)	2 (0.8%)	195
1	145 (54.1%)	228 (76.8%)	193 (71.5%)	191 (82.0%)	209 (82.9%)	966
2	20 (7.5%)	24 (8.1%)	27 (10.0%)	28 (12.0%)	30 (11.9%)	129
3	0	3 (1.0%)	2 (0.7%)	5 (2.1%)	6 (2.4%)	16
4	0	2 (.7%)	1 (.4%)	4	4 (1.6%)	11
5	1 (.4%)	0	1	0 (.4%)	1 (.4%)	3
Totals	268 (100.0%)	297 (100.0%)	270 (100.0%)	233 (100.0%)	252 (100.0%)	1320

6.3 MOTIONS

As noted earlier in this paper, all motions filed were counted whether the motion was heard or not. Pre-trials were counted as motions. The length of time required for a motion could not be ascertained. Even though the defence rate was around 35%, the commencement sample revealed that there were motions in approximately 50% of all cases. Motions are an integral part of civil litigation practice in Toronto; in the trial sample only 16.6% of cases did not have any motions.

For the trial sample, motion activity increased over the five fiscal periods. For example in 1973/74, 34% of all trials had no motions. This should not be surprising in some ways because there were no pre-trials prior to 1975. This number decreased steadily until 1993/94 when only 8.7% of cases recorded no motions. At the high end of the spectrum, 41.2% of cases in the 1988/89 trial sample had five or more motions. This number had climbed steadily from 6.7% in 1973/74, and dropped again in 1993/94 to 22.7%. A summary of the number of motions in the trial study is set out in Table 6.4.

TABLE 6.4 Motions by Fiscal Year in the Trial Study

	73/74	78/79	83/84	88/89	93/94
0 Motions	34.0%	22.6%	14.1%	8.6%	8.7%
1 Motion	23.1%	17.2%	15.9%	6.0%	15.9%
2 Motions	17.5%	21.5%	13.3%	13.7%	21.8%
3 Motions	11.9%	14.5%	11.5%	13.3%	20.2%
4 Motions	6.7%	10.4%	14.4%	17.2%	10.7%
5 or more Motions	6.7%	13.8%	30.8%	41.2%	22.7%

This increase in motion activity is not reflected in the commencement data, with approximately the same distribution of motions being recorded across the first four fiscal periods (see Table 6.5). The 1993/94 fiscal year was excluded because the motion activity in these files is likely not complete. Therefore, we can conclude that motion activity is a reflection of the likelihood of a case going to trial.

TABLE 6.5 Number of Motions by Fiscal Year in the Commencement Study (Excluding 93/94)

	73/74	78/79	83/84	88/89
0 Motions	60.7%	54.0%	39.7%	54.2%
1 Motion	31.6%	25.5%	35.6%	25.9%
2 Motions	4.9%	10.1%	14.4%	11.0%
3 Motions	1.9%	5.7%	7.7%	4.9%
4 Motions	0.5%	2.5%	1.5%	2.8%
5 or more Motions	0.4%	2.3%	1.0%	1.1%

In the commencement study, 38.4% of all motions recorded were in the collection case category. Another 30.5% of motions occurred in the negligence category (including motor vehicle) in 16.4% contract/commercial cases and 14.6% in property cases. It is assumed that a great many of the motions in the collection case category are for substituted service. The motion activity in the commencement survey parallels the case type breakdown reflected in Table 5.2. This may mean that case type and not defence rate is a better predictor of motion activity. Table 6.6 presents a summary of motions activity in different case types in the commencement study.

**TABLE 6.6 Number of Motions by Case Group in the Commencement Study
(Excluding 93/94 Data)**

	NEGLIGENCE	COLLECTION	CONTRACT/ COMMERCIAL	PROPERTY/ OTHER
0 Motions	50.7%	58.9%	44.6%	48.6%
1 Motion	27.2%	32.4%	29.8%	25.3%
2 Motions	14.0%	5.4%	10.5%	13.0%
3 Motions	5.3%	2.3%	7.4%	9.1%
4 Motions	1.5%	0.8%	4.9%	2.0%
5 or more Motions	1.3%	0.3%	2.8%	2.0%

In the trial study, negligence cases represent 47.8% of the cases with motions. Contract commercial cases are 21.1%, collection cases 17.9% and property cases 13.1% of the cases with motions. Negligence cases also led the way in the types of cases with two or more motions, although a higher proportion of the other three case types had multiple motions. As in the commencement survey, the motion activity is almost identical to the number of cases in each of the four case type categories. Further details of these findings can be found in Table 6.7.

TABLE 6.7 Number of Motions by Case Group in the Trial Study

	NEGLIGENCE	COLLECTION	CONTRACT/ COMMERCIAL	PROPERTY/ OTHER
0 Motions	23.2%	12.2%	19.4%	4.7%
1 Motion	15.0%	19.7%	15.1%	15.2%
2 Motions	16.7%	24.8%	13.3%	18.7%
3 Motions	12.8%	12.2%	18.7%	15.2%
4 Motions	12.2%	13.9%	11.3%	8.2%
5 or more Motions	20.0%	17.2%	22.3%	38.0%

6.4 CROSSCLAIMS, COUNTERCLAIMS AND THIRD PARTY CLAIMS

Table 6.8 reveals the extent of counterclaims, third party claims and crossclaims in the cases included in the trial and commencement study.

TABLE 6.8 Frequency of Crossclaims, Counterclaims and Third Party Claims in the Commencement and Trial Studies

	CROSSCLAIMS	COUNTERCLAIMS	THIRD PARTY
Commencement Study	56 (2.58%)	134 (6.2%)	34 (1.57%)
Trial Study	58 (4.4%)	258 (19.6%)	57 (4.32%)

The frequency of crossclaims, counter and third party claims is higher in the trial study. In particular counter claims are substantially higher in the trial sample than in the general population

of cases commenced. A key finding is that counterclaims are the most frequent of these three claim categories in both samples.

6.5 TYPES OF DISPOSITION

Commencement Data

Dispositions were divided into seven categories, from default to trial, and included dismissal, discontinuance, settlement and partial trial. However, of 2,156 dispositions recorded in the sample of commenced cases, the largest category, almost 32%, was "no disposition." Conversely, only 3.5% of the cases ended with a judgment at trial. A summary of disposition types is set out in Table 6.9 below.

TABLE 6.9 Frequency of Disposition Types in the Commencement Study

TYPES OF DISPOSITION	NUMBER	PERCENT
No disposition	685	31.8
Default	611	28.3
Dismissal	80	3.7
Discontinuance	222	10.3
Settlement	466	21.6
Partial trial	17	0.8
Trial	75	3.5

The number of cases with no disposition may be slightly exaggerated because many of the 1993/94 cases have not reached a stage where they would reflect a disposition. Conversely, the other rates, which reflect dispositions, may be somewhat lower because the 1993/94 sample has not reached a disposition stage. The no disposition rates in the first four fiscal periods reviewed ranged between 15 to 18%. This may be caused by the practice of counsel not reporting settlements to the court and the fact that the court does not monitor case outcomes.

Types of disposition by fiscal year indicated consistency across the twenty year period with two exceptions. In the 1988/89 fiscal year default dispositions dropped from an average of approximately 30% of all dispositions to 22.5%. At the same time settlements moved from 20% in 1973/74 to 16.5% in 1978/79, 28.7% in 1983/84 to 30% in 1988/89.

Dispositions by case type confirm the assumptions about default cases in collection and property matters. The commencement study results show that 56.1% of collection cases and 31.3% of property cases resulted in default judgments. Another way of viewing the trial statistics is to note the 7.6% of the contract/commercial caseload goes to trial compared to 4.3% for motor vehicle, 3.8% for property and 3.6% for negligence cases. A detailed description of disposition types by fiscal period and case type in the commencement study are described in Table 6.10 and Table 6.11 below. Tables 6.12 and 6.13 represent disposition types in the trial study.

TABLE 6.10 Type of Disposition by Fiscal Year in the Commencement Study

	73/74	78/79	83/84	88/89	93/94	Row Totals
No disposition	127 30.0%	129 26.6%	109 27.9%	117 27.5%	203 47.1%	685
Default	132 31.1%	146 30.1%	114 29.2%	96 22.5%	123 28.5%	611
Dismissal	10 2.4%	42 8.7%	7 1.8%	17 4.0%	4 0.9%	80
Discontinuance	47 11.1%	51 10.5%	37 9.5%	59 13.8%	28 6.5%	222
Settlement	87 20.5%	80 16.5%	112 28.7%	128 30.0%	59 13.7%	466
Partial trial	1 0.2%	1 0.2%	0 0.0%	2 0.5%	13 3.0%	17
Trial	20 4.7%	36 7.4%	11 2.8%	7 1.6%	1 0.2%	75
Column Totals	424	485	390	426	431	2156

TABLE 6.11 Type of Disposition by Case Group in the Commencement Study

	Motor Vehicle	Negligence	Collection	Contract/ Commercial	Property/ Other	Row Totals
No disposition	134 29.1%	68 40.2%	221 27.5%	128 36.0%	134 36.8%	685
Default	10 2.2%	4 2.4%	452 56.1%	31 8.7%	114 31.3%	611
Dismissal	17 3.7%	8 4.7%	13 1.6%	25 7.0%	17 4.7%	80
Discontinuance	99 21.5%	26 15.4%	46 5.7%	30 8.4%	21 5.8%	222
Settlement	180 39.0%	57 33.7%	60 7.5%	112 31.5%	57 15.7%	466
Partial trial	1 0.2%	0 0.0%	6 0.7%	3 0.8%	7 1.9%	17
Trial	20 4.3%	6 3.6%	7 0.9%	27 7.6%	14 3.8%	74
Column Totals	461	169	805	356	364	2155

TABLE 6.12 Type of Final Disposition by Fiscal Year in the Trial Study

	73/74	78/79	83/84	88/89	93/94	Row Totals
Trial Judgment for the Plaintiff	193 72.0%	221 74.4%	180 66.7%	130 55.8%	146 57.9%	870
Trial & Dismissal	25 9.3%	43 14.5%	45 16.7%	52 22.3%	51 20.2%	216
Partial Trial*	50 18.6%	33 11.2%	45 16.7%	51 21.9%	45 21.8%	234

* Trials began in these cases but the record indicates that the matter was settled or discontinued/dismissed on consent of the parties.

TABLE 6.13 Type of Final Disposition by Case Group in the Trial Study

	Motor Vehicle	Negligence	Collection	Contract/ Commercial	Property/ Other	Row Totals
Trial Judgment for the Plaintiff	283 66.6%	106 51.0%	186 78.2%	184 66.2%	111 64.9%	870
Trial & Dismissal	47 11.1%	60 28.8%	24 10.1%	55 19.8%	30 17.5%	216
Partial Trial*	95 22.3%	42 20.3%	28 11.8%	39 14.1%	30 17.6%	234

* See note in Table 6.12.

Trial Data

Analyzing the trial sample is more complicated since disposition is reflected by two variables. The first variable is whether the case involved a trial or a partial trial. In our sample of 1,320 cases, 82.3% (1086) of the cases were trials, and the remaining 17.7% (234) were partial trials.

The second variable for the trial sample asked whether there was a dismissal, settlement, or discontinuance. If a trial was indicated then the second variable would only be a judgment of some sort for the plaintiff or dismissal. If partial trial was indicated then the second variable would be either a dismissal, settlement or discontinuance. All of these latter variables probably indicate a settlement of some kind during the course of the trial. The following chart represents the dispositions in the trial sample.

TABLE 6.14 Frequency of Disposition Types in the Trial Study

FINAL DISPOSITION	NUMBER	PERCENT
Trial	870	65.9
Trial and Dismissal	216	16.4
Partial Trial	54	4.1
Partial Trial and Dismissal	24	1.8
Partial Trial and Settlement	155	11.7
Partial Trial and Discontinuance	1	0.1
Total	1320	100.0

Examination of the types of disposition both by fiscal year and by case type in the trial study suggests that full trials with judgments for the plaintiff have declined and trials with a dismissal of the plaintiff's claim have increased. Notwithstanding this, plaintiffs still win three out of four trials that proceed to final judgment. The tables also suggest that motor vehicle and negligence cases are more likely to result in a partial trial and settlement.

6.6 PACE OF LITIGATION GENERALLY

Table 6.7 sets out the global picture of the pace of litigation in the trial and commencement studies. It should come as no surprise that the time to final disposition is slower in the trial study. However, there appears to be no difference between the two samples' elapsed time in the earliest stages of the process: from the incident to filing and from the filing to defence in each study. It would appear that whether a case goes to trial or not may not be predicted from the time required to start a lawsuit or to file a defence once litigation begins.

TABLE 6.15 The Pace of Litigation in the Commencement and Trial Studies

	QUARTILES	COMMENCEMENT STUDY	TRIAL STUDY
Incident to filing	1	77	92
	2	175	224
	3	404	383
		n=2089	n=1304
Filing to defence	1	46	50
	2	99	105
	3	202	244
		n=742	n=1123
Defence to disposition	1	210	462
	2	479	707
	3	868	1071
		n=523	n=1123
Incident to disposition	1	182	719
	2	438	1070
	3	963	1576
		n=1415	n=1304
Filing to disposition	1	52	512
	2	180	799
	3	562	1228
		n=1424	n=1319

NOTE: All measurements are in days. N equals the number of cases included in each category.

Quartile 1 reports the number of days it took the fastest 25% of the cases to move from point to point. Quartile 2 looks at the time for 50% of the cases (i.e. the median time). Quartile 3 reports the number of days it took before 75% of the cases moved from point to point.

A more complete analysis of this area should examine the pace of litigation in the context of case type, jury trials, fiscal years and the relationship between the parties. It may also be

appropriate to ask how pace is affected by such factors as crossclaims, third party claims or counterclaims.

6.7 THE PACE OF LITIGATION IN NEGLIGENCE CASES

In the commencement study the pace of litigation for negligence cases (including motor vehicle cases) was isolated. The results of this analysis are set out below in TABLE 6.16. The table does not include cases commenced in 1993/94 since cases in this year would not have progressed far enough to allow for a valid comparison with earlier fiscal years.

TABLE 6.16 Time From Filing to Disposition (in days) of Negligence Cases in the Commencement Study

	MEDIAN (in days)	THIRD QUARTILE (in days)	90TH PERCENTILE (in days)	% OVER 2 YEARS	NO. OF CASES
All years	592	1039	1482	41%	391
73/74	365	686	1256	25%	89
78/79	549	942	1329	39%	97
83/84	509	999	1463	36%	86
88/89	817	1201	1611	57%	119

The same analysis for the trial study is contained in Table 6.17 below.

TABLE 6.17 Time From Filing to Disposition (in days) of Negligence Cases in the Trial Study

	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	% OVER 2 YEARS	NO. OF CASES
All years	799	261	1659	54.3%	632
73/74	477	774	1111	27.1%	181
78/79	772	1128	1498	53.5%	144
83/84	689	1167	1565	47.5%	122
88/89	1185	1517	1887	82.4%	102
93/94	1307	1715	2127	90.4%	83

6.8 THE PACE OF LITIGATION BY FISCAL YEAR

Using the same approach by fiscal year for all cases in the trial study produced the results reported in Table 6.18 below.

TABLE 6.18 Pace of Litigation by Fiscal Year in the Trial Study

	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	% OVER 2 YEARS	NO. OF CASES
All years	799	1228	1714	55.2%	1319
73/74	547	876	1346	32.6%	267
78/79	728	954	1494	49.5%	297
83/84	664	953	1509	43.7%	270
88/89	1052	1361	2020	77.3%	233
93/94	1088	1355	1918	77.8%	252

Tables 6.16, 6.17 and 6.18 provide an overview of changes in the pace of civil litigation in Toronto in the past twenty years. It is clear, for example, that the length of time from filing to disposition has grown in that time period. Both the samples of cases filed and cases tried in 1973/74 moved more expeditiously than any group of cases in subsequent fiscal years. Table 6.16 shows that half the negligence cases in 1973-74 were concluded within one year of filing (median time of 365 days). Even negligence cases that went to trial were concluded within an average of 16 months (Table 6.17; median disposition time of 477 days).

The 1978/79 cases showed increased delays over 1973/74 for all three time periods. For example, the median time for negligence cases commenced (Table 6.16) jumped over 50%, from 365 days to 549 days; the time taken to dispose of 75% of the negligence cases jumped from 686 days (over 22 months) to 942 days (31 months); and the time taken to dispose of 90% rose slightly as well, from 1256 days to 1329 days.

Less change was observed in the 1983/84 cases. Median times declined by 40 to 83 days, while the times for 75% and 90% of the cases to be completed increased slightly (and in one instance not at all). However, large increases in elapsed time were reported by the 1988/89 fiscal year. These increases were noticeable in the cases commenced in 1988/89 (as shown in Table 6.16). The disposition of these cases could have been delayed in the aftermath of *Regina v. Askov* (October 18, 1990) and the merger of Supreme and District Courts (September 1, 1990). However, Tables 6.17 and 6.18 also show substantial increases for cases that went to trial in 1988-89, before *Askov* required that resources be shifted from civil to criminal trials. The pace of litigation in the commencement study is described in Table 6.19.

TABLE 6.19 Pace of Litigation by Fiscal Year in the Commencement Study

	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	% OVER 2 YEARS	NO. OF CASES
All years	180	562	1083	18.7%	1424
73/74	139	411	993	14.1%	284
78/79	206	581	1041	18.7%	348
83/84	236	610	1259	20.2%	267
88/89	334	902	1343	35.2%	304
93/94*	116	253	428	0%	221

* There were 434 cases sampled in this year. Not enough of these cases had progressed through the system to make reasonable comparisons with other fiscal periods.

6.9 THE PACE OF LITIGATION AND THE RELATIONSHIP OF THE LITIGANTS

The pace of litigation may also be affected by the relationship between the parties or the existence of cross claims, counter claims or third party claims. Tables 6.20 and 6.21 consider these variables.

TABLE 6.20 Time (in days) to Disposition by Litigant Relationship in the Commencement Study

RELATIONSHIP	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	NO. OF CASES
Business	90	309	759	994
Personal	557	990	1514	369
Professional	371	941	1271	38
Government	346	881	1073	11
Other	259	628	705	10

TABLE 6.21 Time (in days) to Disposition by Litigant Relationship in the Trial Study

RELATIONSHIP	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	NO. OF CASES
Business	790	1204	1723	724
Personal	770	1218	1596	509
Professional	1057	1358	1860	53
Government	899	1503	2182	12
Other	914	1285	1655	21

Table 6.20 suggests that litigation by parties with a business relationship is substantially faster than litigation by parties with a personal relationship; a median time of three months in the former compared with over 18 months in the latter. However, the sample of cases that went to trial, shown in Table 6.21, indicates that litigants with a business relationship take slightly longer to bring their disputes to a conclusion than litigants with a personal relationship—a sharply different finding. Thus the difference between personal-relationship cases and business-relationship cases is not that one group moves to trial faster, but that the business-relationship cases that do not go to trial are likely to be resolved much more quickly than personal-relationship cases.

6.10 THE PACE OF LITIGATION IN CASES WITH COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

Table 6.22 summarizes the pace of litigation in cases with counterclaims, crossclaims and third party claims. Cases with these claims were slower than negligence cases (Tables 6.16 and 6.17) and all cases combined (Table 6.18 and 6.19). This difference in time is statistically significant.

TABLE 6.22 Time (in days) to Disposition in Cases with Crossclaims, Counterclaims and Third Party Claims

	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	NO. OF CASES
Commencement	689	1192	1624	143
Trial	978	1356	1856	337

6.11 THE PACE OF LITIGATION IN JURY AND NON-JURY TRIALS

A very small percentage of cases in the trial study were heard by a jury. Tables 6.23 and 6.24, set out below, provide an overview of the pace of litigation in jury and non-jury cases. The tables reveal some interesting trends.

TABLE 6.23 Pace of Litigation for Non-Jury Trials in the Trial Study

	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	% OVER 2 YEARS	NO. OF CASES
All years	769	1083	1701	53.0%	1163
73/74	548	776	1367	32.6%	227
78/79	719	933	1457	46.9%	277
83/84	629	951	1506	42.3%	248
88/89	1018	1343	2023	75.0%	192
93/94	1016	1314	1911	74.4%	219

TABLE 6.24 Pace of Litigation for Jury Trials in the Trial Study

	MEDIAN	THIRD QUARTILE	90TH PERCENTILE	% OVER 2 YEARS	NO. OF CASES
All years	1018	1323	1749	71.9%	153
73/74	539	761	1118	33.3%	39
78/79	1059	1412	1590	85.0%	20
83/84	782	1178	1537	59.1%	22
88/89	1301	1423	1793	87.2%	39
93/94	1356	1484	1955	100.0%	33

On the whole jury trials appear to have become somewhat slower than non-jury trials but this difference does not manifest itself at the 90th percentile. In addition, the elapsed times were about the same in 73/74, slowed in jury cases in 78/79, returned to the same pace in 83/84 and thereafter jury cases fell behind the pace noticeably in the median range.

6.12 APPEAL RATES

In the trial study 7.2% of judgments awarded to plaintiffs resulted in an appeal. The appeal rate for cases where the plaintiff's claim was dismissed was 8.8%. The appeal rates, whether brought by plaintiffs or defendants, varied over the five periods reviewed. In the first three

periods the rates were 6.0% (1973-74), 6.1% (1978-79) and 7.0% (1983-84). The appeal rate rose to 10.7% in 1988-89 and fell drastically in 1993-94 to 2.8%.

Surprisingly the appeal rate from jury decisions was 9.8% compared with the non-jury rate of 6.0%. When judgments for a plaintiff were isolated from judgments for defendants, the results are even more dramatic - 16.3% of jury trials are appealed versus 6.3% of non-jury verdicts for plaintiffs. The total number of cases available for analysis was 85. A larger sample might produce different results.

7.0 LANDLORD AND TENANT APPLICATIONS

Summary of this Section

- *The vast majority of landlord and tenant applications are brought by landlords attempting to evict tenants who have failed to pay their rent.*
- *The number of such applications has increased substantially over the past twenty years, from 6,951 in 1973 to 40,068 in 1994.*
- *The caseload increase is likely the result of a combination of factors, including some important legislative changes in 1975, a tight rental market throughout much of the 80s, and a serious economic recession (together with very high unemployment rates) in the early 90s.*
- *A high proportion of landlord and tenant applications are not contested and many are resolved in the Registrar's office through default orders. Between 1973 and 1994, only about 10% of all applications resulted in judicial hearings. When hearings did occur, they were very short.*
- *However, a higher proportion of cases are being set down for a hearing today than twenty years ago. The number of cases requiring a judicial hearing increased ten-fold between 1973 and 1994.*
- *In most cases, landlords are successful in their applications. However, it is taking them increasingly longer to obtain court orders. Landlord and tenant matters take about three times longer to process today than they did twenty years ago.*

7.1 METHODOLOGY

A study was conducted of 1,200 landlord and tenant files in Metropolitan Toronto. Approximately half of the province's landlord and tenant matters are dealt with within Metropolitan Toronto and this proportion remained steady over the period of the study.²⁴

Four hundred cases were randomly selected from the files at three time periods: 1973-74, 1983-84 and 1993-94. A copy of the questionnaire used for this study is included in Appendix 3.

Before examining the results of the study, it is important to take note of the significant statutory changes to the regulation of rental housing which took place in Ontario at the beginning of the period as well as other demographic and economic factors which may have had an impact on landlord and tenant caseloads.

²⁴ The paper does not consider whether or how landlord and tenant applications in Toronto are different from other parts of the province.

7.2. FACTORS INFLUENCING LANDLORD AND TENANT CASELOADS

7.2.1. Changes to the *Landlord and Tenant Act*

Fiscal year 1973/74 was chosen as a starting point for the study because it predates some major changes made to the *Landlord and Tenant Act* in 1975.

The most important change made in 1975 was that tenants were given a legal right to security of tenure. This means that a tenancy does not end automatically at the end of a fixed term; instead, the landlord may only terminate a tenancy for one of the specific reasons listed in the Act: e.g. failure to pay rent; damage to the unit; use of the unit for illegal activity; impairment of the safety or lawful rights of other tenants; conversion of the unit to the landlord's own use, or the use of his or her family.

In order to terminate for any of the reasons set out in the Act, the landlord must provide the tenant with notice of the reason for terminating the tenancy. The landlord may then apply to court for an order terminating the tenancy and a writ of possession (permitting the landlord to take possession of the premises). In addition, the landlord may seek payment of any arrears of rent or compensation for any damages done to the premises. The tenant may, of course, contest the landlord's application and cross-apply for other forms of relief: e.g. abatement of rent based on the landlord's failure to keep the premises in good repair.

Since 1975, there have been no other major changes to the Act. However, the security of tenure provisions have been extended to some residents not originally covered by the Act: e.g. residents of mobile home communities and of care homes.

One would expect the 1975 changes to result in an increase in the volume of landlord and tenant applications, not only because these changes required landlords to obtain a court order and demonstrate grounds before terminating a tenancy, but also because new legislation typically causes a surge of litigation as the new rules are tested in the courts.

7.2.2. Number of Renter Households

Some increase in landlord and tenant applications should also be expected simply on the basis of the increase in the number of renter households in the province, and in Toronto.

The number of renter households province-wide increased from 842,000 in 1974 to 1.12 million in 1984, an increase of about 25%. Between 1984 and 1994, the number of rental units increased by another 14% to approximately 1.3 million. About 44% (or 574,870) of these are in Metropolitan Toronto.

7.2.3. Availability of Affordable Housing

As will be seen, the majority of landlord and tenant applications involve applications by landlords to terminate tenancies on the basis of unpaid rent. This raises the question of whether or how changes in the availability of affordable housing have affected landlord and tenant caseloads.

Supply of Rental Housing

Most of the increase in the province's rental housing supply since the 1970s has come from the public sector and from other "non-conventional" sources; i.e. rentals of condominiums, non-profits and cooperatives. However, despite these new forms of supply, the rental housing market

has been extremely tight throughout much of the period of the study, particularly the market for low-cost rental housing in Toronto.

In a tight housing market, tenants are less able to move voluntarily or immediately when they fall into default (or are at risk of falling into default) on their rent. As a result, landlords may be filing applications to remove tenants who do not dispute the application, but cannot move until they have secured alternative housing elsewhere.

General Economic Climate

As noted above, Ontario's economy, housing prices and unemployment rates have fluctuated over the past twenty years. It should be noted, however, that the renter population tends to have lower incomes and more severe housing affordability problems than the homeowner population. The negative impact of periodic economic recessions and high unemployment rates on tenants may well be reflected in an increase in the number of tenants falling into default in their rent and consequently in the number of landlord and tenant applications being filed in the courts.

Rent Controls

In addition to the introduction of security of tenure, rent controls were introduced in Ontario for the first time in 1975 through the *Residential Premises Rent Review Act*, S.O. 1975 (2nd sess.) c. 12. Tighter rent controls were put into place in 1979, at which time the Residential Tenancies Commission was established to review applications for rent increases above a 6% cap. In 1986, the *Residential Rent Regulation Act*, 1986, S.O. 1986, c. 63 broadened the scope of rent control to nearly all privately-owned units, altered the calculation of the maximum rent increase and reduced the cap to 2%. The *Rent Control Act*, 1992, S.O. 1992, c. 11 replaced the previous legislation but did not make any significant substantive changes to the rent control scheme.

As rent control is not part of the *Landlord and Tenant Act*, and is not enforced through the courts, it has no direct impact on the volume of landlord and tenant applications. However, it may have had an indirect impact on these applications. In the absence of rent controls, it is possible that the number of tenants falling into rent arrears, and the volume of landlord applications brought on this ground, would have risen faster than it did.

7.3. CASELOAD GROWTH

The table below demonstrates the steady increase in the number of landlord and tenant applications brought in Toronto, and in Ontario, between 1974 and 1994:

TABLE 7.1 Landlord and Tenant Applications - Toronto and Ontario: 1973-1994

PERIOD	TORONTO	ONTARIO
1973-1974	3,633	6,951
1983-84	10,847	19,728
1993-94	18,318	40,068

Some of the increase in the 1974-83 period may be due to the *Landlord and Tenant Act* changes which were enacted in 1975. These changes do not, however, explain the continuing rise in applications over the whole period.

The increase is not due exclusively to an increase in the number of renter households, as the table below shows. The incidence of landlord and tenant applications rose continuously throughout the period:

TABLE 7.2 Frequency of Landlord and Tenant Applications - Ontario: 1973-1994

	1973-74	1983-84	1993-94
No. of Rental Units	842,000	1,122,000	1,300,000
No. of Applications	6,951	19,728	40,068
Frequency of Applications	0.826%	1.76%	3.08%

7.4. GENERAL CASELOAD CHARACTERISTICS

In some respects, landlord and tenant caseloads did not change substantially over the twenty year period covered by the study. Throughout the period:

- The vast majority of applications were brought by landlords seeking the termination of a tenancy and/or a writ of possession, most often for non-payment of rent.
- Landlords were generally represented by agents or lawyers (although more often by agents than lawyers after 1974).
- Most tenants (about 86%) did not respond to landlord applications. Of those who did respond, slightly more than half did so by appearing in person rather than by filing written argument. Counter-applications by tenants were extremely rare. (The file sample was too small to give reliable estimates of how many tenants had legal representation.)
- A majority of cases were resolved by the Registrar through default orders in favour of the landlord. And a significant proportion of cases were resolved through consent orders or were withdrawn. Over the whole period, only about 10% of all applications resulted in a hearing before a judge. When hearings did occur, they were very short (almost always less than one day).

In summary, throughout the period the landlord and tenant caseload involved the routine (and largely non-judicial) processing of applications by landlords seeking to end a tenancy and repossess premises. Usually, these applications were brought as a result of unpaid rent and the vast majority of them were not contested and did not require a hearing.

7.5. ORDERS REQUESTED BY LANDLORD

Table 7.3 shows that after 1974 most landlords are requesting a writ of possession as well as an order for termination of the tenancy.

TABLE 7.3 Orders Requested by Landlord

Order Requested by Landlord	1973-74 (N = 389)	1983-84 (N = 393)	1993-94 (N = 394)
Termination of Tenancy	91.8%	85.5%	86.3%
Writ of possession	41.9%	93.6%	96.4%

The data did not show clearly in what proportion of cases the landlord was making a claim for rent arrears. However, as the following table demonstrates, most of the applications for writs of possession were based on non-payment of rent.

TABLE 7.4 Basis for Writ of Possession

Basis for Writ Requested by Landlord	1973-74 (N = 162)	1983-84 (N = 316)	1993-94 (N = 380)
Non-payment of rent	97.5%	98.4%	96.1%
Other reason	2.5%	1.6%	3.9%

7.6. DISPOSITIONS BY THE REGISTRAR

As Table 7.5 demonstrates, a declining proportion of cases are being resolved by the registrars through a default order or by being struck off the list. More are being set down for a hearing before a judge.

TABLE 7.5 Dispositions by Registrar

Type of Disposition	1973-74	1983-84	1993-94
Adjourned	6.4% (25)	3.3% (13)	8.7% (34)
Consent	2.6% (10)	0.5% (2)	0.00% (0)
Dismissed	1.0% (4)	0.5% (2)	1.5% (6)
Default Order	60.6% (235)	55.1% (217)	50.6% (199)
Struck off list	8.2% (32)	6.3% (25)	1.3% (5)
Withdrawn	9.8% (38)	20.3% (80)	17.8% (70)
Set down for a hearing	11.1% (43)	13.7% (54)	19.6% (77)
Other	0.3% (1)	0.3% (1)	0.5% (2)
Total	100.0% (N = 388)	100.0% (N = 394)	100.0% (N = 393)

Combined with the rising volume of cases, this change in the registrar's practice has resulted in a substantial increase in the number of cases being set down for a hearing by a judge.

TABLE 7.6 Estimated Number of Cases Set Down for a Hearing Toronto: 1973-1994

	1973-74	1983-84	1993-94
Total Caseload	3,633	10,847	18,318
Percent Set Down for Judicial Hearing	11.1%	13.7%	19.6%
No. Set Down for Judicial Hearing	403	1,486	3,590

7.7 DISPOSITIONS BY A JUDGE

Not all of the cases set down for a hearing before a judge result in a hearing. Table 7.7 shows that an increasing proportion of these cases are being disposed of without a hearing, largely due to an increase in the number of consent orders. This suggests that in a larger proportion of the cases being set down for a hearing, there either is no real dispute between the parties or the dispute has been resolved by the time the matter comes before a judge.

TABLE 7.7 Dispositions by a Judge

Type of Disposition	1973-74	1983-84	1993-94
Adjourned	5.9% (2)	6.9% (4)	4.5% (4)
Consent order	8.8% (3)	22.4% (13)	33.0% (29)
Withdrawn before hearing	17.6% (6)	13.8% (8)	8.0% (7)
Hearing held	67.7% (23)	56.9% (33)	54.5% (48)
Total	100% (N = 34)	100% (N = 58)	100% (N = 88)

These percentages should be read with caution, given the small numbers in each category.

As the following table demonstrates, despite the increase in the number of cases being resolved through consent orders, the proportion and number of cases requiring judicial time has still continued to rise.

TABLE 7.8 Estimated Number of Cases Requiring a Judicial Hearing Toronto: 1973-1994

	1973-74	1983-84	1993-94
Total No. of Applications	3,633	10,847	18,318
Percent of Applications Requiring a Hearing	6%	8%	12%
No. of Applications Requiring a Hearing	217	868	2,198

Despite these seemingly dramatic increases, the numbers should be put into perspective. Given that there are over 570,000 rental units in Toronto, an estimated 2,200 hearings means that only about 0.36% of all landlord and tenant relationships in Toronto gave rise to problems which required "adjudication" in the courts in 1993-94. As noted above, these adjudications tended to be quite brief and did not take a lot of court time.

7.8 ORDERS MADE

As the following two tables demonstrate, regardless of whether applications are disposed of by the Registrar or by a Judge, most landlords are successful.

TABLE 7.9 Frequency of Orders Made by Registrar on Consent or Default*

Type of Order Made	1973-74 (N = 245)	1983-84 (N = 219)	1993-94 (N = 200)
Writ of Possession	98%	97.3%	90.0%
Termination of tenancy	98%	92.2%	89.5%
Rent Arrears	95.1%	84.9%	92.5%
Costs	92.6%	91.4%	78.0%

*Percentages add up to more than 100% because multiple orders are made in most cases.

TABLE 7.10 Frequency of Orders Made by Judge

Type of Order Made	1973-74 (N=34)*	1983-84 (N=58)*	1993-94 (N=88)*
Writ of Possession	47.1%	41.4%	45.5%
Termination of tenancy	38.2%	39.7%	42.0%
Rent Arrears	44.1%	39.7%	68.2%
Order for Abatement of Rent	0.0%	3.4%	1.1%
Conditional Order	5.9%	8.6%	9.1%
Costs	32.4%	13.8%	37.5%

* The numbers in this Table are slightly different from the numbers set down for a hearing in Table 7.5 due to motions setting aside registrar decisions. Percentages add up to more than 100% because more than one order can be made in each case.

The sample size here was extremely small and therefore may not be reliable. However, it does appear that landlords are less successful where judicial hearings take place in obtaining all forms of relief requested. It should also be noted that orders in favour of tenants (conditional orders and orders for abatement of rent) were relatively rare throughout the period. The sample did not pick up any cases in which the landlord was ordered to make repairs. (Again, however, this may be a product of the small sample size.)

There is very little change in the frequencies of different types of orders over time, with two exceptions: there appears to have been a temporary drop in cost awards in the 1983-84 period and an increase in rent arrear awards in the 1993-94 period.

7.9. LENGTH OF THE PROCESS

Table 7.11 demonstrates that after 1974, landlord applications came before the Registrar as quickly as they had previously. However, the length of time between the appearance before the Registrar and a hearing before a Judge increased substantially. In the 1984-1994 period, landlord applications were not only delayed in getting before the Registrar, but were also delayed further in getting before a Judge. The total amount of time to resolve an application set down for a hearing with a Judge increased from 23.5 days in 1974 to 35.5 days in 1984 to 55.5 days in 1994. In other words, landlords seeking to evict tenants could obtain an order within a month at the beginning of the period, but by the end of the period had to wait close to two months (from the date of filing the application). Since landlords are also required to provide tenants with notice before filing an application, it would likely take at least three months for a landlord to obtain an order terminating a tenancy and a writ of possession to remove a tenant.

TABLE 7.11 Time for Resolution of Applications (Median)

Time Period	1973-74	1983-84	1993-94
Between date of application and appearance before Registrar	18 days	17 days	23 days
Between appearance before Registrar and hearing before a Judge	5.5 days	18.5 days	32.5 days

8.0 CIVIL LITIGATION IN OTHER JURISDICTIONS

Summary of this Section

- *Annual statistical information is available on a country wide basis for U.S. state and federal courts*
- *Ontarians appear to be far less litigious than Americans, and also less litigious than the English. In terms of civil cases per capita, Ontario ranks below 47 of the 50 states, and well below the per capita rate in England and Wales.*
- *The pace of tort litigation in England and Australia approximates that of Ontario.*
- *The pace of tort litigation in England, Australia and Toronto in the early 1980s would rank about the midpoint of disposition times for comparable litigation in major U.S. cities.*

8.1 INTRODUCTION

Comparison with other jurisdictions is an activity often fraught with difficulties. Procedural differences across jurisdictions may influence the amount of litigation. Structural variation leads to different allocations of litigation between general and limited jurisdiction courts. Legislation may remove large portions of personal injury litigation from the courts. Even within the United States, the Williamsburg, Virginia-based National Center for State Courts has struggled for over a decade to define a "case" in terms that are common from one state to another, so that comparison across states can be valid.

Empirical information on civil justice is less current and less readily available in Canada and other Commonwealth countries than in the United States. A request for civil case data from other Canadian provinces yielded extensive information from British Columbia; other provinces (including Quebec and the Maritimes) have developed caseload data, but those figures are not

collected and distributed nationally, as is the established practice with caseload figures south of the border and in England and Wales.

8.2 CIVIL LITIGATION IN AMERICAN STATE AND FEDERAL TRIAL COURTS

Figures compiled for 1992 in the United States report a total of 9,550,501 civil cases in state trial courts of general jurisdiction.²⁵ Over one-third of those (3,326,059) are domestic relations cases. The major case types (using National Center for State Court categories) are shown in Table 8.1.

TABLE 8.1 Composition of Civil Caseloads in State Courts of General Jurisdiction, 1992

CASE TYPE	% OF CASELOAD
Domestic Relations	35%
Tort	9%
Contract	11%
Real Property	9%
Other civil	14%
Estate	9%
Small Claims	11%
Mental Health	1%
Civil Appeals	1%

Source: Brian J. Ostrom et al., *State Court Caseload Statistics: Annual Report 1992* (National Center for State Courts, Feb. 1994) at 15.

Tort cases are composed of automobile torts (57%), malpractice (7%), product liability (4%) and other torts (32%).²⁶ In general, tort filings have remained constant from 1986 to 1992.²⁷ Overall civil filings in state courts of general jurisdiction have grown steadily by 3 to 5% each year since 1985.²⁸ Meanwhile, the U.S. federal district courts have experienced a 14% decline in the same period, with a total of 230,509 civil filings reported in 1992. That figure declined slightly to 229,850 in 1993, but federal civil filings jumped to 263,391 in 1994.²⁹

8.3 CIVIL LITIGATION IN ONTARIO COMPARED TO THE UNITED STATES

The most difficult aspect of comparing civil litigation rates across countries is being sure to include and exclude comparable classes of cases. Our approach in this section is to report civil

²⁵ Brian J. Ostrom et al., *State Court Caseload Statistics: Annual Report 1992* (National Center for State Courts, Feb. 1994) at 44.

²⁶ *Ibid.*, p. 16.

²⁷ *Ibid.*

²⁸ *Ibid.*, p. 10.

²⁹ L.R. Mecham, *Judicial Business of the United States Courts: 1994 Report of the Director* (Washington, D.C.: Administrative Office of the U.S. Courts) at 2.

data collected by the National Center for State Courts covering a full range of civil cases, and then compute the total number of Ontario cases in comparable categories. Since Ontario's estimated 1992 population of 10,098,003³⁰ would place it easily among the most populous American states (between seventh-ranked Ohio and eight-ranked Michigan), Table 8.2 reports civil filings from the ten largest states.

TABLE 8.2 Ten Most Populous States and State Court Civil Filings, 1992*

STATE	POPULATION	CIVIL FILINGS	CIVIL FILINGS RANK
1. California	30,867,000	1,917,310	1
2. New York	18,119,000	1,729,717	2
3. Texas	17,656,000	864,934	7
4. Florida	13,488,000	914,540	6
5. Pennsylvania	12,009,000	695,078	11
6. Illinois	11,631,000	753,131	9
7. Ohio	11,061,000	819,400	8
8. Michigan	9,437,000	716,295	10
9. New Jersey	7,789,000	1,038,761	4
10. North Carolina	6,843,000	599,297	12

* Based on 1992 Population and Civil Filings. Civil includes all civil matters in both limited and general jurisdiction courts plus estate and domestic relations matters.

Source: Brian J. Ostrom et al., *State Court Caseload Statistics: Annual Report 1992* (National Center for State Courts, Feb. 1994) at 10.

The U.S. data in Table 8.2 cover civil matters in both limited and general jurisdiction trial courts, so Ontario figures will need to include all small claims matters in the province. The U.S. data also include all domestic relations matters, requiring that comparable Ontario figures include not only divorce applications but also family court business in both major categories: *Family Law Act* matters and child welfare cases. Finally, the U.S. figures include estate matters and landlord and tenant cases.

The Ontario figures, for fiscal year 1992-93, are shown in Table 8.3. The bottom line is 413,852 filings, a total well below the figures in any of the ten largest states. Overall, Ontario would rank fifteenth on that list, between number fourteen Indiana (population 5,622,000) and Wisconsin (population 5,007,000).

TABLE 8.3 All Ontario Civil Filings 1992-93

Statements of Claim - MV	7,032
Statements of Claim - FLA/CLRA	3,429
Statements of Claim - other	83,259
Divorce Petitions Filed	34,999
Applications Filed - FLA/CLRA	6,539
Applications Filed - other	11,393
Applications Filed - Prob/Admin	27,145

³⁰ Statistics Canada, *Postcensal Annual Estimates of Population*, June 1, 1992 (publication # 91-210).

Solicitor-Client Appointments	8,460
Party & Party Appointment	2,301
Landlord and Tenant Dispositions	36,274
Child and Family Services Act	18,984
Family/Children's Law Application	46,995
Small Claims Court Filings	127,042
TOTAL	413,852

Source: Court Statistics Annual Report, 1992-93, Ministry of the Attorney General, Ontario. The 1992-93 report incorrectly reported the number of filings in Small Claims Court as 73,599. This number was readjusted upward to 127,042 in subsequent reports.

To the extent that American figures are not comparable to Canadian, it is because American figures do not include cases that are included in the Ontario total. For example, U.S. federal court filings are not shown in Table 8.2. Federal civil filings are approximately 3% of state filings, adding another increment to the American totals. In turn, Ontario figures include solicitor-client and party-and-party hearings to assess and distribute court costs, a procedure not available in any American jurisdiction.

To control for population, filings may be expressed per 100,000 population. Looked at in this way there are 4,098 civil filings per 100,000 people in Ontario. This filing rate would rank Ontario 48th compared with American states, narrowly ahead of Mississippi, as well as Nevada and Tennessee.

8.4 ENGLAND AND WALES

While few Ontarians would be surprised to learn that they are less litigious than Americans, how would Ontario civil litigation rates compare with those in England? The 1988 Civil Justice Review³¹ reported 1986 civil filings of 259,500 in the High Court, and 2,496,020 in the 274 County Courts. Based on a population of 49,654,000 in England and Wales, the filing rate per 100,000 population is 5,555. Including an estimated 450,000 small claims court cases to make the total comparable to the U.S. and Canadian figures in Tables 8.2 and 8.3, the filing rate rises to 6,541. This rate would rank 27th in the list of U.S. state courts and well ahead of the litigation rate in Ontario.

The breakdown of case types shown in Table 8.4 suggests that the higher litigation rate in England and Wales is a reflection of a higher proportion of collection cases in both the High Court and County Courts. At the same time, however, tort (negligence) claims in England and Wales include almost as many workplace accidents as motor vehicle accidents. (Workplace accidents are excluded from Canadian courts.) Another interesting contrast with Ontario is the trial rate in England and Wales: only 1.2% in the High Court, and 1.0% in the County Court, one-third the rate in Ontario courts.

³¹ Report of the Review Body on Civil Justice, June 1988 (London: HMSO, Cmnd. 394) at 6.

TABLE 8.4 Civil Case Types Filed in Courts in England, Wales and Ontario

	Ontario	England and Wales	
		High Court	County Court
Collection	37.4%	75.3%	88.0%
Negligence	29.3%	9.2%	1.1%
Property	16.9%	3.2%	6.8%
Contract	16.4%	12.3%	4.1%

Source: Table 5.2 *supra* and *Court Justice Review: Report of the Review Body on Civil Justice* (London: HMSO, Cmnd. 394, June 1988) at 6-7.

8.5 COMPARING THE PACE OF LITIGATION IN ENGLAND, AUSTRALIA, ONTARIO AND THE UNITED STATES

When we examine the pace of litigation across legal systems, it is especially important that we compare similar types of cases. Otherwise, for example, we would expect the English courts to appear much faster than those in Ontario because (as shown in Table 8.4), a much higher proportion of English civil cases are collection cases, and collection cases are typically faster (since they are less frequently defended and less frequently go to trial than negligence cases. Because the most systematic American studies focused on tort case disposition time, and data on English and Australian negligence cases are also available, these cases will be the focus of our attention.

According to the background papers written for England's 1988 Civil Justice Review, there were approximately 3,000,000 accidents annually which led to 300,000 informal claims with insurers of which 50-55,000 resulted in civil litigation in the two levels of trial courts. Of these claims, 41% arose from accidents at work and 44% from motor vehicle accidents. A study of 796 cases filed in England and Wales between 1980-82 examined the average days (both the median and mean) from filing to disposition for these cases. Tables 8.5 and 8.6 summarize the English findings and compare them with Ontario data from Tables 6.16 and 6.17.

TABLE 8.5 Time (in days) from Filing to Disposition for Non-Trial Cases in England and Ontario

	RCJ ^a	DR ^b	CC ^c	ONT ^d 78/79	ONT ^d 83/84
Mean	766	612	276	689	708
Median	552	545	260	549	509

^a Royal Court of Justice, London.

^b District Registries of the High Court.

^c County Court of England and Wales.

^d See Table 6.16; based on commencement study, which includes a small percentage of trial dispositions.

Source: English and Wales data: Inbucon Management Consultants, *Civil Justice Review Study of Personal Injury Litigation* (London: Lord Chancellor's Department, Feb. 1986), App. I, p. 56, partially reproduced in *Civil Justice Review*, note 31, *supra* at 78. Figures given in months have been converted to days.

Table 8.6 Time (in days) from Filing to Disposition by Trial, Tort Cases in England and Ontario

	RCJ ^a	DR ^a	CC ^a	ONT ^b 78/79	ONT ^b 83/84
Mean	985	985	542	855	822
Median	880	910	512	772	689

^a See notes to Table 8.5.

^b See Table 6.17.

Examination of these tables shows that the pace of tort litigation in Toronto is comparable to that of the High Court in England, but is slower than the pace in the County Courts.

Australian data on the pace of litigation are somewhat more limited. While a detailed study was done in the state of Victoria a decade ago, the only quantitative study that includes more than one state was Ross Cranston's 1985 study for the Australian Institute of Judicial Administration, *Delays and Efficiency in Civil Litigation*. That study covered New South Wales, Victoria and the Australian Capital Territory (ACT), but only collected data from the Supreme Courts, omitting the County Courts and Magistrate's Courts, both of which have civil jurisdiction. At the same time, the study did separate industrial accidents from motor vehicle accidents, as shown in Table 8.7.

TABLE 8.7 Pace of Litigation, Personal Injuries, Average Time in Days from Commencement to Disposition, NSW, Victoria and ACT Supreme Courts*

	NSW	VIC	ACT
Motor Vehicle	712	842	691
Industrial Accident	628	627	544
Number of Cases	238	136	87

* Source: Ross Cranston et al., *Delays and Efficiency in Civil Litigation* (Melbourne: Australian Institute of Judicial Administration, 1985), pp. 40, 25. The tables do not indicate whether the "average time" is reported as the mean or the median.

Comparing the Australian figures in this table with the English and Ontario mean times shows their comparability. To the extent that civil litigation may be too slow, it is too slow in the superior courts in all three jurisdictions.

Finally, it is worth noting that the median times for disposition shown in these tables would place England, Australia and Toronto at about the middle of the tort disposition times for major U.S. cities in similar studies conducted in 1975 and 1985.³² Median times from filing to disposition in the 1975 study ranged from 288 days to a high of 811, and in 1985 study from 279 to 782 days. It should be noted, however, that the pace of civil litigation has been speeded up in a

³² Thomas W. Church et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts*. (Williamsburg: National Center for State Courts, 1978); Barry Mahoney et al., *Changing Times in Trial Courts* (Williamsburg: National Center for State Courts, 1985).

number of American cities, and remained stable in others, while Tables 6.16 and 6.17 show that the pace of civil litigation in Toronto has slowed down considerably over the past 20 years.

9.0 CONCLUSION

The purpose of this paper has not been to prescribe improvements in the administration of civil justice in Ontario, but to present data that can be a basis for assessing the potential impact of reform proposals. By examining the environment, content, processing and outcome of civil litigation over the past twenty years, we may be in a better position to evaluate civil justice in Ontario.

In this initial effort, data gathering was limited to civil filings and landlord and tenant applications in the General Division of the Ontario Court of Justice and its predecessor courts in Toronto. The case mix may be somewhat different in Toronto than in other court centres in the province, but it is likely that further data gathering in those centres will also reveal, for example, a high proportion of undefended cases, a shift away from tort cases, and increasing delays in moving cases from initiation to disposition.

Any quantitative study must proceed with some care. The extent to which sampled cases reflect the overall population must be considered. An emphasis on normal or routine cases must not allow knowledge of general patterns to displace knowledge of the smaller number of lengthy, complex and important cases whose adjudication raises new challenges for procedural improvement. At the same time, a number of interesting findings have been made, and the data set developed for this study is now available for additional analysis of patterns of civil litigation over time, and for comparison with data gathered by other jurisdictions.

APPENDIX 1

METHODOLOGY

The data collection sheet which appears at Appendix 2 reveals the range of information which was expected to be found in the court files. The data collection sheet was drafted in consultation with experienced social science researchers, court administrators and lawyers. The time spent in crafting this document was crucial to the success of the survey. There would be little point, for example, in collecting the name of plaintiffs' lawyers if this information was rarely available or if it was not connected in any way with the study purpose and expectations. A clear vision of the empirical data to be obtained also assisted with decisions that had to be made during the research about interpretations and methodology. By way of illustration, the number of motions filed was collected without regard to the length of the motion or whether it was actually heard by a judge or master. The purpose of the study was to gain a broad overview of cases with some sense of the complexity of litigation as measured by, for instance, the number of litigants, the length of the pleadings, the amount of money in issue, the type of damages being claimed and the number of motions filed. Since motion activity was not the focus of the survey and since nearly 3,700 files had to be reviewed, details about the type, length and outcome of motions filed were not recorded.

This model of data collection may, with or without modifications, serve as part of the future data collection system for the court or it may suggest other information that should be gathered. A new data collection system should serve a wide variety of needs and minimize the need for a manual survey of court files in the future. Notwithstanding a good data instrument, experienced file reviewers and fine cooperation in locating and retrieving files, a manual review of court files to discover some basic facts about the operation of the civil justice system is not an optimum use of time.

This report uses a variety of descriptive and inferential statistics. Descriptive statistics describe the sample that has been measured without generalizing to the population from which it was drawn. The descriptive statistics used were medians, means, quartiles and deciles.

The median provides a measure of central tendency such that half of the sample will be above it and half of the sample will be below it. This is particularly useful for skewed distributions. The arithmetic mean, frequently referred to as the "average" is the sum of all of the values for the cases divided by the number of cases. Quartiles and deciles divide the sample distribution into 4 or 10 groups of an equal number of cases. For example, if the value for the first quartile is 50, it means that 25% of the sample had a score of 50 or less. If the ninth decile's value is 85, it means that 90% of the distribution had a score of 85 or less, and 10% scored equal to or higher than 85.

Inferential statistics were used for two purposes: (1) to test whether a relationship existed between two variables; for example, whether one factor could explain an observed result, and (2) to test whether a relationship found in our sample was likely to be found in the population as a whole.

The inferential statistics used included an analysis of variance, t-tests and chi squares. An analysis of variance provides a systematic way of studying variability and is used to test the null

hypothesis that the means of three or more populations are equal to each other. T-tests for independent groups were used to examine the null hypotheses that the means of two populations were equal to each other. The chi squares examine whether two variables are related. In a chi square, the null hypothesis is that the observed frequencies are due to random sampling from a population, in which the proportions in each category of one variable are the same for each category of the other variable.

The process followed to gather the quantitative data reported in this paper is set out below. This paper presents and analyzes the results of two studies tracing civil cases commenced and cases tried in each of five fiscal periods spanning a period of approximately 20 years. Family law cases, small claims cases and matters brought by way of application were not included. Applications are files intended to be disposed by use of affidavit evidence rather than by a continuous oral trial. The fiscal year for Ontario is April 1 - March 31. The five periods considered included 1973/74, 1978/79, 1983/84, 1988/89 and 1993/94. Only cases commenced in the Toronto courts were examined.

1. The Civil Court Structure in Ontario 1973-1995

The court structure in Ontario has changed during the 20 year period under review. Ontario had been divided into 49 distinct counties and districts for municipal purposes. Some of these county organizations have now been replaced by regional governments. These municipal divisions were the basis upon which the court system was structured. In 1973/74, Ontario consisted of 49 different juridical seats which housed the county courts. In 1973/74, the county court had a jurisdictional limit of \$25,000. All claims under \$400 (\$800 in Northern Ontario) were handled in a small claims court, which was supervised by County Court judges. The Supreme Court of Ontario was an itinerant court and made use of the facilities in each of the 49 counties and districts. Supreme Court cases were filed and tried in each of the 49 counties and districts. The jurisdiction of the small claims court was raised to \$1000 in 1977 and in Toronto to \$3000 in 1979. In 1993, the jurisdiction was increased for the entire province to \$6000.

In 1973, there existed in Toronto the County Court of the Judicial District of York and the Supreme Court of Ontario. Claims for the County Court were filed at 361 University Avenue, the same location as its trial office. Supreme Court cases were filed at 145 Queen Street which was also the location of the Supreme Court trial office. These buildings are located within 200 metres of each other.

In 1985, the County Courts were replaced by the District Court of Ontario. The monetary jurisdiction of the District Court remained the same as the former County Courts except that its jurisdiction included the entire province. One of the main purposes of the amendment was, in effect, to remove county lines for jurisdictional purposes.

On September 1, 1990, the District Court of Ontario and the Supreme Court of Ontario were merged to form the Ontario Court (General Division). The Ontario Court (General Division) together with the Ontario Court (Provincial Division) formed the Ontario Court of Justice which is the trial court for the province. For the purposes of the review and to ensure that samples taken from these various courts were uniform over time, a sample of cases, proportional to the numbers filed, was chosen from the former District and County Courts, and the Supreme Court.

Tables 2.1 and 2.2 set out the number of cases filed in each court for the relevant periods and the samples retrieved from each court location. The tables also show the minimum sample size required to ensure that the samples were statistically significant.

2. The Location of Court Files

Court files are stored numerically in order of filing in both 361 University Avenue (sometimes referred to as the General Office) or 145 Queen Street (sometimes referred to as the Central Office). Current cases are stored on site and are only removed from each site when there is no longer sufficient storage space. The number of files in storage at each court site varies according to the number and size of the files. Ordinarily, cases can be found on site for three years at Queen and five years at University. After 3-5 years cases are transferred, whether the files have been closed or not, to an off site storage location.

For the purposes of this study, all files commenced prior to 1990 were stored off site. Cases for the 1993/94 period were located at either 145 Queen Street or 361 University Avenue.

3. Selection of Court Files for Cases Commenced in the Five Fiscal Periods (the "Commencement Study")

Two separate studies were undertaken as part of this research. A sample of approximately 2200 cases commenced in both the former County and Supreme Courts in Toronto were reviewed as part of the first study (hereinafter referred to as the "commencement study"). The second study (hereinafter referred to as the "trial study") consists of cases which actually went to trial in each of the fiscal periods. The latter is described in more detail below. The process for selection included:

- Confirmation of the number of cases commenced in each fiscal period by reference to court storage records. Generally speaking these figures were in agreement with the figures reported in the Court Statistics Annual Reports.
- Appropriate location and storage codes were then confirmed for each of the fiscal periods.
- Boxes of files were randomly selected across the span of each fiscal period and ordered from storage facilities for review. For earlier fiscal periods County Court storage boxes contained approximately 50 to 60 files. In the same period, Supreme Court boxes contained approximately 20 to 25 files. The number of files in each box decreased for each court as court files grew larger in the 1980's.

There was some concern that there may be a number of similar case types (i.e. collection cases filed by a bank) filed consecutively by the same law firm if the selection of boxes as opposed to individual files was used. This concern did not prove to be a factor. Boxes of files were ordered rather than individual files because of the sheer volume of work involved in selecting, boxing and shipping this number of files.

4. Process for Review in the Commencement Study

The *Archives Act* provides that public court files come under the jurisdiction and control of the Archivist of Ontario after 20 years. As a result, the files from 1973/74 period could only be ordered and reviewed under the direction and with the cooperation of the Archivist of Ontario. Cases commenced in this period were reviewed at the archival reading room located at 77 Grenville Street, Toronto. Files for the fiscal periods 1978-79, 1983-84 and 1988-89 were reviewed at the offices of the Ministry of the Attorney General at 720 Bay Street. Files for the 1993-94 periods were reviewed at each court site.

Information from each court file was recorded on a data sheet. The data sheet used for purposes of the review and the data sheet instructions are attached as Appendix 2. This data sheet

was developed in consultation with a number of individuals with various areas of expertise including law, court administration and statistical methods. The bulk of the files was reviewed by three lawyers who had been recently called to the bar and the principal researcher. In addition, some of the files were reviewed by two articling students employed by the Ministry.

Prior to commencing the review a discussion took place concerning procedures and the data sheet instructions. During the actual review of files, all of the reviewers remained together so that any questions and issues could be dealt with and discussed as a group. This process was followed to encourage uniformity.

Completed data collection sheets were then assembled for entry onto a computer using the Statpac software program. The same individual entered the data for both the commencement and the trial study. Errors on the review sheets were noted and returned for correction.

Work on the commencement study began on Monday, February 6, 1995, and was completed on February 24, 1995. Table 2.1 summarizes the sample of cases reviewed in the commencement study.

5. Process for Review in the Trial Study

Studies of court caseloads usually indicate that only 3 to 5% of cases commenced result in a trial.

The commencement study provides a broad overview of cases filed with the court but does not provide enough information on trials to draw any firm conclusions. To overcome this difficulty, a statistically significant sample of cases which actually went to trial in each of the relevant time periods was located and reviewed. The same data collection sheet used in the commencement study was used in the trial study. The process for location and selection of cases that went to trial was different than that used for the commencement study and proved to be a significant logistical challenge.

The trial offices in each court did not keep a permanent list of cases that went to trial. Trial offices received the trial records of cases set down for trial. A current list of cases that might eventually go to trial was all that was maintained. These lists, however, were not kept or stored and the trial records were returned to the main file when a case was completed. There is no permanent record of cases that eventually go to trial. Faced with this difficulty researchers had two choices. First, to review index cards in the central and general offices and make a note of cases where the record was passed and the file was sent to the trial office. A second approach was to review the minute books maintained by court clerks in each of the courts and select cases where there was an indication that a trial commenced, witnesses were called and exhibits filed. The latter method was considered more efficient since there are so many cases where the record was passed but no actual trial took place. Researchers were careful to select the correct proportion of cases from each court and in the trial study, the correct proportion of jury to non-jury files. Cases were selected throughout the fiscal period being examined.

The minute books in the Supreme Court were well organized and easy to locate. Each book was organized into civil jury and non-jury trials and researchers simply reviewed these books and selected an appropriate number of cases for each of the fiscal periods 1973-74 to 1988-89.

In the County Court the challenge was much greater. Court books were not separated as between criminal and civil, jury and non-jury. As a result, researchers had a great deal of difficulty in locating the various minute books maintained by County Court clerks. Many minute books contained criminal matters or motions or combinations of civil, motions and civil matters. A great many more books were reviewed in County Court before civil trials could be identified.

A file number was recorded when there was an indication that evidence was called and/or exhibits were tendered. Researchers were not concerned with whether the trial was completed or whether the defendant was present. A trial for this study was a hearing started before a judge in which evidence was tendered.

For the 1993-94 period a summary of all court activity is electronically recorded. A computer check was run and a list of cases that went to trial was produced within 15 minutes. Cases were then randomly selected from the generated list. Research for trials in the other four fiscal periods took two people working for approximately six days.

Once the file numbers for cases which had gone to trial were determined, the task of locating each of the files was then undertaken. The trial survey consisted of approximately 1500 files of which 1250 files were in storage. It was not cost effective to require that 1250 files be located, retrieved and repacked in bankers boxes for delivery to 720 Bay Street and to the archivist's office. As a result researchers travelled to the storage locations in Mississauga and Mimico and manually pulled each of the boxes and located each trial file before reviews were undertaken. This particular survey could not have been undertaken without the cooperation of the Archivist of Ontario, and the significant effort of the articling students, the researchers and those involved at each of the storage locations. As with the general study, trial files were selected proportionately as between the two courts. Table 2.2 sets out the number of trials held in each fiscal year in each court and the samples reviewed for this study.

Work on the trial study began on March 9, 1995, and 1500 trial files were completely reviewed by March 31, 1995. Data entry and error correction for both studies was completed by April 28, 1995.

In the selection of court files for 1993-94 trials, cases were drawn proportionately from each court location across the fiscal period. Researchers were careful to include in the 1993-94 sample an appropriate proportion of case managed and commercial list files.

☐ bank, trust company, credit union _____

of defendants _____

6. **Defendant's Lawyer**

☐ law firm ☐ legal clinic ☐ no lawyer

☐ government lawyer ☐ in house

of defendant lawyers _____

change of lawyer ☐ yes ☐ no

number of changes ☐ 1 ☐ 2 ☐ 3 ☐ 4 or more

Nature of the Claim

7. **Relationship**

a) ☐ business ☐ personal ☐ professional

☐ government/institutional ☐ other ☐ not known

b) ☐ one time ☐ short term ☐ long term ☐ not known

8. **Cause of Action Date**

month	day	year	

☐ cannot be determined

☐ ongoing

9. **Commencement Date**

month	day	year	

☐ claim ☐ specially endorsed writ ☐ generally endorsed writ

length of claim exclusive of writ, i.e., number of pages _____

comments ☐ yes ☐ no

10. **Amount Claimed**

☐ special damages (liquidated) \$ _____

☐ general damages (unliquidated) \$ _____

☐ punitive/exemplary damages \$ _____

☐ other orders requested _____

11. **Case Type** Reference should be made here to the case type definitions

a) **Negligence**

☐ motor vehicle

☐ motor vehicle/family law

☐ medical/professional malpractice

☐ negligence/contract

☐ other negligence

b) Contract/Commercial

- ☐ collection
☐ contract/commercial
☐ construction liens/mechanics lien
☐ bankruptcy
☐ wrongful dismissal
☐ other contract

c) Real property

- ☐ other real property
☐ landlord and tenant

d) Other

- ☐ estates
☐ trust/fiduciary duties

12. Statutory Basis of Claim

- ☐ none
☐ *Negligence Act*
☐ other [indicate statute(s)] _____

Nature of the Defence

13. Number of statements of defence filed _____

14. Court Filing Date
of earliest defence

_ _ _	_ _ _	_ _ _	_ _ _
month	day	year	

Court Filing Date
of latest defence

_ _ _	_ _ _	_ _ _	_ _ _
month	day	year	

Do any of the
statements of
defence contain a

- ☐ cross claim
☐ counter claim
☐ set off

length of defence, i.e., number of pages_____

if more than one statement of defence, indicate the length of:
 the shortest _____ and the longest _____

comments ☐ yes ☐ no

15. Third Party Claims

date of issue

_ _ _	_ _ _	_ _ _	_ _ _
month	day	year	

of third parties_____

Disposition

16. **Type of Disposition** ☐ no disposition ☐ default ☐ dismissal ☐ discontinuance
 ☐ settlement ☐ trial ☐ partial trial

17. **Disposition** a) Damages
 ☐ special damages (liquidated) \$ _____
 ☐ general damages (unliquidated) \$ _____
 ☐ punitive/exemplary damages \$ _____

b) other orders (please specify) _____

18. **Date of Disposition**

month		day		year		

General Information

19. **Jury / Non-Jury** ☐ jury ☐ non-jury

20. **Number of Motions** _____

21. **Date Trial Began**

month		day		year		

22. **Date Trial Ended**

month		day		year		

23. **Number of Days** _____

24. **Appeal** ☐ yes ☐ no

**CIVIL JUSTICE REVIEW
DATA COLLECTION INSTRUCTIONS
ACTIONS COMMENCED BY WRIT OR CLAIM IN TORONTO, 1973 - 1994**

- a) **Date Today** *The reviewer should indicate the day which the file is reviewed (shown as MONTH, DAY, YEAR). Use numerical references only and not short form of name of month.*
- b) **Initials** *The reviewer should place his or her initials in this category.*
- c) **Data Sheet Number** *Each reviewer will be assigned a block of four-digit data sheet numbers to relate hard copy sheets to computer database.*

Case Identification

1. **Court** Indicate whether the case was commenced in the Supreme Court of Ontario (S.C.O.); the County or District Court (D.C.O.); or the Ontario Court (General Division) (Gen. Div.)
2. **Case I.D. Number** Here record the court file number.

The Plaintiff(s)

3. **Plaintiff Category** Indicate in the appropriate box whether the plaintiff is a corporation, a partnership or proprietorship, an individual, government or banking institution. Please note that some government officials go by the name of an individual only. For example, the building inspector for Toronto issued all claims in the name of Michael Dixon. Therefore it may not be possible to answer the question until you have read the writ of summons or the statement of claim. Indicate the number of plaintiffs in each category. Unincorporated community groups should be included under partner or proprietorship. If the plaintiff is suing by their next friend trustee or guardian, indicate individual and do not count the next friend or guardian as an additional person. If two or more named individuals or corporations are sued as a partnership, count as a partnership only. For a subrogated claim indicate the category of the assignor and not the assignee.

If multiple plaintiffs, indicate the total number of plaintiffs.

4. Plaintiff's Lawyer

Indicate whether, at the time of commencement, the lawyer is from a law firm, legal clinic, government or if there is no lawyer.

If there is a change of solicitors during the course of the litigation, this should be indicated.

The Defendant(s)

5. Defendant's Category

See the instructions in 3 above which are also applicable here.

6. Defendant's Lawyer

Indicate whether the lawyer is from a law firm, legal clinic, sole practitioner, government. If the defendant appears without a lawyer, indicate no lawyer. If the defendant does not appear, skip this section.

If there is a change of lawyer, this should be noted.

The number of law firms acting for the defendants should be noted.

Nature of the Claim

7. Relationship

a) Indicate, if possible, whether the plaintiff and defendant were engaged in a business, professional, personal or governmental/ institutional relationship. A lawsuit between two individuals over a motor vehicle accident is personal. A client suing a doctor or lawyer is professional. A bank suing a customer is business. An employee suing for wrongful dismissal is business. If a relationship cannot be determined, indicate this.

b) Indicate relationship of plaintiff and defendant: a one time, a short term (less than six months), or long term (more than six months) relationship.

8. Cause of Action Date

The date the cause of action arose is to be inserted here. For motor vehicle accidents, this will be the date of the motor vehicle accident, or for wrongful dismissal cases, the date the employee was fired. Where the data cannot be determined, this should be indicated. A strict legal interpretation of cause of action should not be used. We would like to know when the dispute likely arose. If a cause of action is ongoing, do not indicate not known but rather give the date when the dispute arose.

9. Commencement Date

The date that the statement of claim or writ was issued by the court. This will be clearly written on the front of the writ or claim and confirmed by a stamp in the back of the document.

Please indicate whether specially or generally endorsed writ.

Indicate the number of pages of the claim and/or writ. You may record any comments here if desired. Data entry will only record whether or not comments were made and not the substance of the comments.

10. Amount Claimed

This should be broken down as special damages (liquidated), general damages (unliquidated), punitive/exemplary damages, or other relief sought (i.e., specific performance, rescission, etc.). The amount claimed in each category should be shown. A request for funds in a lien action should be categorized as general damages. Sometimes general and special damages are claimed but not specifically broken out. If this occurs, place the figure requested under general damages. The other relief we expect to see includes specific performances, recision, foreclosure, possession, interim injunction, injunction, declaration, accounting sale of lands, reference, *lis pendens* or charge on land, set aside, replevin, windup mandatory order and discharge or appoint receiver. Check off as many as apply.

11. Case Type

Reference should be made to the case type and definitions attached. Do not include Family Law Claims.

a) Negligence

- motor vehicle
- motor vehicle/family law
- medical/professional malpractice
- negligence/contract
- other negligence

b) Contract/Commercial

- collection
- contract/commercial
- construction liens/mechanics lien
- bankruptcy
- wrongful dismissal
- other contract

c) Real property

- other real property
- landlord and tenant

d) Other

- estates
- trust/fiduciary duties

12. Statutory Basis of Claim

If the claim advanced is premised, in whole or in part, on a statutory provision, i.e., the *Negligence Act*, *Highway Traffic Act*, *Sale of Goods Act*, or *Mortgages Act*, indicate the statute(s) referred to in the pleadings. If no statute is pleaded, please indicate "none".

Nature of the Defence

13. Number of statements of defence filed ____ (this is self-explanatory)

14. Court Filing Date

The date the statement of defence is filed with the court is inserted here. If more than one statement of defence, indicate the date of filing of the first statement of defence and the last statement of defence.

Please indicate whether any of the statements of defence includes a counter claim, set off or cross claim. Check off as many which apply.

Please indicate the length (in pages) of the statement of defence. If more than one statement of defence, indicate the length of the longest statement of defence and the shortest statement of defence.

See note regarding comments in number 9 above.

15. Third Party Claims

The date of issuance third party notice is to be included. Indicate number of third parties added.

Disposition

16. Type of Disposition

Reference should be made to the types of disposition definitions attached.

- no disposition • default • dismissal • discontinuance
- settlement • partial trial • trial

17. Disposition

Amount of any disposition. Please note special damages, general damages, or punitive/exemplary damages. Fill in as many which apply.

If any other order is made, please indicate type of order.

18. **Date of Disposition** Here record the date disposition occurred.

General Information

19. **Jury / Non-Jury** Indicate whether a jury has been requested. The case will not be a jury trial unless trial or partial trial is indicated under number 16 above.
20. **Number of Motions** Count the number of separate motions brought filed whether heard or not. This includes crown motions and motions by a solicitor to get off the record. The pretrial should be counted as a motion. Please do not include any activity after judgment for enforcement.
21. **Date Trial Began** See court minute sheets or the reasons for judgment or the endorsement on the record to find this information.
22. **Date Trial Ended** See court minute sheets or the reasons for judgment or the endorsement on the record to find this information.
23. **Number of Days** Number of trial days. See court minutes or the reasons for judgment. There will not be any way to determine if a full or partial day was taken. Count all days used as a full day.

CASE TYPE DEFINITIONS

MOTOR VEHICLE: All claims based on tort or contract claiming damages arising from the operation of a motor vehicle. Includes all claims for property damages and personal injury and claims by an insured for failure to pay on an insurance contract for damages arising out of motor vehicle accidents.

MOTOR VEHICLE/FAMILY LAW: Motor vehicle accident case as defined above together with a family law claim.

MEDICAL/PROFESSIONAL MALPRACTICE: All claims founded in negligence against any health professional or health organization or institution. Also included in this category are claims in negligence against other professionals, such as lawyers, engineers, accountants, architects, etc.

NEGLIGENCE/CONTRACT: Includes claims based on both negligence and contract. See definitions of other negligence and contract/commercial set out below.

OTHER NEGLIGENCE: Includes all claims based on negligence which have not been included in motor vehicle, medical/professional malpractice and should include damages for both personal and property damage. Includes such categories as slip and fall, trespass, assault, or assault and battery, false arrest/imprisonment, product, product liability, defamation, libel and slander, wrongful conversion and conspiracy/fraud. Also include copyright infringement and intentional torts such as assault, false imprisonment.

COLLECTION: Includes all claims for liquidated damages arising from a failure to pay a promissory note, simple demand on a contract and other claims based on bills and notes. Includes money owing for work done, goods delivered or services performed where the amount claimed is a sum certain. May also be referred to as debtor/creditor, but is not to include bankruptcy cases or claim for arrears of rent or claims based on a mortgage.

CONTRACT/COMMERCIAL: Includes all cases where there is a claim for damages arising from a breach of contract. Unlike the collection category, the damages claims are general damages; that is to say, that the amount claimed is not a sum certain that can be calculated according to an agreed formula found in the contract. Caution should be taken to distinguish these cases from construction lien claims and all other cases based on specific types of contracts such as claims under a mortgage, commercial lease agreements, and other claims involving real property. These claims should also be distinguished from claims for wrongful dismissal.

CONSTRUCTION LIENS: All claims made under the *Construction Lien Act*, or its predecessor the *Mechanics' Lien Act*.

BANKRUPTCY: Does not include civil actions brought by or against a bankrupt's estate unless the issues go to the authority of the bankrupt's trustee or a contest as to the priority of claims. Proceedings concerning petitions for bankruptcy are normally brought by way of application and will not be found here. Cases involving the appointment of a receiver may be placed here.

WRONGFUL DISMISSAL: Includes all claims for damages by a former employee against an employer for wrongful dismissal.

OTHER CONTRACT: Lawsuits that cannot be categorized under collection or contract commercial may be placed here. These cases should be rare.

ESTATES: Does not include claims based on contract or tort, or any other basis brought by the estate of a deceased. Should include only disputes involving the division of assets or estates, the authority of executors and administrators, will interpretations, contested assessments and passing of accounts, etc.

LANDLORD & TENANT RESIDENTIAL: Residential tenancy disputes involving arrears of rent, damages to property, failure to repair, lease, interpretations of lease, etc.

TRUST/FIDUCIARY DUTIES: Includes all claims which are solely or along with contract or negligence founded upon a claim for breach of trust or fiduciary duty.

OTHER REAL PROPERTY: Includes mortgages, foreclosures and forced sales, disputes involving commercial leases and agreements of purchase and sale. Generally, all claims involving ownership, use and enjoyment of real property, but should not include claims for damages to property based on negligence or contract.

DISPOSITION TYPE DEFINITIONS

NO DISPOSITION (ND): This category should be used when there is no apparent judgment order or notice of dismissal, or some type of final action taken by the court in relation to a case. Cases in this category will then be analyzed as to whether there was a statement of defence filed and as to the age of the case.

DEFAULT: These include all cases where a default judgment or order was obtained. A successful undefended motion for summary judgment should be included here.

DISMISSAL: Caution must be taken when using this categorization. Often cases will be dismissed after an agreement or settlement has been reached by the parties. In such a situation, the true disposition is a settlement which results in a dismissal of a case. The dismissal categorization should be used only where a case is dismissed by the court for want of action, or some conduct on the part of one of the parties. This includes cases which are struck off the trial list by the court.

DISCONTINUANCE: This category should be used where a notice of discontinuance is filed and there is no indication of settlement.

SETTLEMENT: This will be the largest single category. It includes a consent settlement before trial, settlements during trial and motions to discontinue as a result of a settlement. As with the other disposition types, once categorization has been made, the next important factor is to determine the time when the disposition was obtained. We are interested not only in whether there was a settlement, but whether that settlement occurred before the pleadings were closed, or after a pretrial, etc. If there is no further activity after an interim injunction is issued or after the appointment or discharge of a receiver, the settlement category should be used.

TRIAL: This category includes only those cases which involved a full trial, and resulted in a decision or judgment of the court.

PARTIAL TRIAL: Here include cases where a trial began but did not result in a judgment because of a settlement. Also include defended cases for summary judgment which are successful. This category may be used in conjunction with settlement or dismissal.

APPENDIX 3

LANDLORD AND TENANT METHODOLOGY AND LANDLORD AND TENANT EMPIRICAL STUDY

METHODOLOGY

The files were reviewed by the same individuals who reviewed civil claims. The review was conducted over eight days between February 27 and March 8, 1995. The object of the study was to examine the historical development of the landlord and tenant process and therefore, three time periods were chosen as representative. Many of the comments set out in the civil claim methodology apply to this study unless specifically stated otherwise.

The Ministry of the Attorney General reports statistics by a fiscal year which runs from April 1 to March 31. Fiscal year 1973-74 was chosen because it predates a major change to the *Landlord and Tenant Act* in 1975. Two additional fiscal periods, taken at ten year intervals, 1983-84 and 1993-94, completed the sample. The number of landlord and tenant applications increased substantially during this twenty year period, but the study examined 400 files for each of the three periods, since this number met or exceeded a statistically significant sample for these three years.

After consultation with landlord and tenant representatives, a response form was developed for the review of files. The aims of the form were:

- to identify quickly the dispute;
- to assess legal representation for both landlords and tenants; and
- to track the levels of decision-making through which the dispute travelled.

Approximately half of the province's landlord and tenant matters are dealt with within Metropolitan Toronto, and this proportion has remained steady for the twenty years of the study. Therefore, to expedite the process of file review, only cases filed at the Toronto court location were included in the study. Prior to 1980, Metro Toronto was a major portion of the Judicial District of York, but this district also included what was then the County of York (currently York Region; i.e. Newmarket, Markham, Richmond Hill).

The exclusion of York Region from the later samples is not thought to have a significant impact on the data since a very small proportion of the files would have originated from York Region in the 1974 sample. For example in 1981, the first year which reported York Region files separately from the Judicial District of York, 120 files were reported in York Region, compared to 8586 in the remainder of the former Judicial District.

Files from 1973-74 and 1983-84 are stored in boxes at the warehouse facilities of the Ministry of the Attorney General. These files had to be ordered from the facility for review. Because

jurisdiction over the 1973 files had already been transferred to the Archivist of Ontario, these files could only be reviewed at the reading room of the Archivist at 77 Grenville Street, Toronto. Rather than ask the storage facility staff to pull and ship 800 separate files, the review team decided that several boxes of files would be reviewed which covered the fiscal period in question. These boxes were then shipped to the Archivist, in the case of the 1973 files, or to the office of the Ministry of the Attorney General in the case of the later files.


Boxes of files from the 1973-74 fiscal period contained primarily landlord and tenant files, with a small number of other types of applications. When reviewers reached a file that did not involve a landlord and tenant dispute, that file was returned to the box and another selected. Boxes of files from the 1983-84 fiscal year contained all types of applications including bulk sales and changes of name (two matters which were indexed and stored separately in 1974). Approximately 50% of the files in these boxes were landlord and tenant, so reviewers had to ensure that they had selected the correct file type before proceeding.

The 1993-94 files are still stored in the court house at 361 University Avenue in Toronto. Currently, landlord and tenant files are stored completely separately from all other types of applications. The review team was able to select the 400 files for this sample by pulling every 50th file for the fiscal year.

The files were reviewed by three newly called lawyers. The three reviewers sat together at all times to allow them to discuss any concerns they might have about the completion of the review form, and to reach a consensus among themselves.

The data were entered by a data entry clerk, and were then compiled and checked by statistical support staff. Any incongruous responses were corrected by reference to the file, which in most cases was still available. Data sheets which could not be corrected were discarded.

(a) *Date Today*



A horizontal timeline with tick marks at intervals of 1 month, 1 day, and 1 year. The labels 'month', 'day', and 'year' are placed below the timeline at their respective intervals.

month day year

c) *Data Sheet Number*

(b) *Initials* _____

**CIVIL JUSTICE REVIEW
DATA COLLECTION SHEET
RESIDENTIAL LANDLORD AND TENANT APPLICATIONS COMMENCED
IN TORONTO, 1973 - 1994**

Case Identification

1. Case I.D. Number _____

The Applicant

2. **Applicant** ☐ landlord ☐ tenant

3. **If Applicant is Landlord** ☐ corporation ☐ partner or proprietorship ☐ individual
☐ public housing authority ☐ property management corporation

4. **Representation** ☐ law firm ☐ legal clinic
☐ government lawyer ☐ agent
☐ no lawyer or agent

change of lawyer or agent ☐ yes ☐ no
number of changes ☐ 1 ☐ 2

5. Evidence filed with Application ☐ yes ☐ no

The Respondent

6. **Dispute**

- ☐ written dispute filed
- ☐ respondent appeared, without written dispute, before Registrar to dispute orally
- ☐ no written or oral dispute by respondent

7. Respondent ☐ landlord ☐ G tenant

8. **If Respondent is Landlord** ☐ corporation ☐ partner or proprietorship ☐ individual
☐ public housing authority ☐ property management corporation
9. **Representation** ☐ law firm ☐ legal clinic
☐ government lawyer ☐ agent
☐ no lawyer or agent
 change of lawyer or agent ☐ yes ☐ no
 number of changes ☐ 1 ☐ 2

Nature of the Application

10. **Application** | | | | | |
month day year
11. **Term of Tenancy Agreement** ☐ weekly ☐ monthly ☐ yearly
☐ fixed term less than one year ☐ other ☐ unknown
12. **Address of Rental Premises** _____

13. **Rental Premises** ☐ building ☐ mobile home park ☐ land lease community
14. **Case Type** *[NOTE: CHECK MORE THAN ONE BOX IF APPLICABLE.]*
Landlord Application:
☐ for a writ of possession
☐ for non payment of rent and for payment of rent arrears
 • amount claimed \$ _____
☐ for non payment of rent with no application for payment of rent arrears
☐ for damage to premises • amount claimed \$ _____
☐ for illegal act
☐ for substantial interference with reasonable enjoyment
☐ for serious impairment of safety or other legal rights of other tenants
☐ due to number of occupants
☐ as caretaker's employment terminated
☐ for landlord's own use (including family)
☐ for material misrepresentation of income in subsidized housing
☐ for persistent late payment
☐ for demolition, conversion, renovation
☐ as tenant no longer qualifies for subsidized housing
☐ as employer providing housing and employment terminated
☐ where tenant occupied pursuant to condominium agreement which has not been completed

- ☐ for payment of rent arrears with no application for writ of possession
 • amount claimed \$ _____
- ☐ for termination of tenancy agreement
- ☐ for an injunction
- ☐ for compensation
- ☐ other application (specify): _____

Tenant Application:

- ☐ for repairs
- ☐ for abatement of rent • amount claimed \$ _____
- ☐ for damages • amount claimed \$ _____
- ☐ for relief to enforce privacy rights
- ☐ for return of security deposit
- ☐ for possession
- ☐ for termination of tenancy agreement
- ☐ concerning assignment or sublet
- ☐ for an injunction
- ☐ other reasons (specify): _____

Nature of the Response

15. Court Filing Date

month	day	year			

 ___ No Response

16. Counter Application

- (a) If the tenant is the respondent, is there any indication (in written dispute, Registrar's endorsement, Judge's endorsement or reasons), that respondent has counter applied for any remedy? ☐ Yes ☐ No
- (b) If the answer to question 16(a) is "Yes", specify nature of relief requested:
- ☐ repairs
- ☐ abatement of rent • amount claimed \$ _____
- ☐ damages • amount claimed \$ _____
- ☐ other (specify) _____
- (c) If the answer to question 16(a) is "Yes", was the counter application in writing?
- ☐ Yes ☐ No

NOTE: *The tenant is able to seek relief as a respondent, whether or not he/she has filed a written response to the landlord's application with the court.*

Disposition

17. Registrar Appearance

Date of the Appearance

month	day	year			

(a) Disposition at appearance before Registrar

- ☐ Struck off the list
☐ no disposition
☐ adjourned
☐ default order
☐ consent order
☐ withdrawn
☐ dismissed
☐ set down for a hearing
☐ other (specify): _____

(b) If the Registrar signed a default order or a consent order, specify the type of relief ordered: *[NOTE: Check more than one box if applicable.]*

- ☐ writ of possession issued
☐ tenancy terminated
☐ rent arrears ordered • amount \$ _____
☐ repairs ordered
☐ abatement of rent ordered • amount \$ _____
☐ damages ordered • amount \$ _____
☐ termination of tenancy if tenant does not pay specified amount
☐ injunction
☐ compensation amount \$ _____ Compensation Per diem \$ _____

(c) Did the Register order costs? ☐ Yes ☐ No

(d) If the answer to question 17(c) is "Yes", specify the amount of costs: _____

18. Set Aside Motions

(a) If there was a default order, was a motion brought to set it aside? ☐ Yes ☐ No

(b) If the answer to question 18(a) is "Yes", what was the disposition on the motion?

- ☐ set down for a hearing
☐ set aside conditionally (e.g. payment to be made by tenant)
☐ other (specify): _____

19. Hearing Before Judge

(a) Did the matter, whether from the Registrar, or after a set aside motion, proceed to a hearing before a judge? ☐ Yes ☐ No(b) Apart from any set aside motion, were any interim motions brought prior to the hearing date? ☐ Yes How many? _____ ☐ No(c) Disposition at Hearing Before Judge *[NOTE: Check more than one box if applicable.]*

- ☐ no disposition
☐ adjourned
☐ withdrawn prior to hearing

- ☐ consent judgment
- ☐ writ of possession issued
- ☐ tenancy terminated
- ☐ rent arrears ordered • amount \$ _____
- ☐ repairs ordered
- ☐ abatement of rent ordered • amount \$ _____
- ☐ damages ordered • amount \$ _____
- ☐ termination of tenancy if tenant does not pay specified amount
- ☐ other type of conditional order (specify): _____
- ☐ injunction
- ☐ compensation Amount \$ _____
- ☐ costs \$ _____

General Information – Hearing Before Judge

20. **Date Hearing Began**

21. **Date Hearing Ended**

22. **Number of Days**_____

23. **Appeal from Judge’s Order Filed** ☐ Yes ☐ No

monthdayyear

monthdayyear

- | | |
|----------------------|---|
| a) Date Today | The reviewer should indicate the day which the file is reviewed (shown as MONTH, DAY, YEAR). Use numerical references only and not short form of name of month. |
| b) Initials | The reviewer should place his or her initials in this category. |
| c) Data Sheet Number | Each reviewer will be assigned a block of four-digit data sheet numbers to relate hard copy sheets to computer database. |

1. Case I.D. Number

Here record the court file number.

2. Applicant

All residential tenants are individuals. Landlords can be one of several types of legal entities. See point 4 if the applicant is a landlord.

- ### 3. If Applicant is Landlord

Indicate in the appropriate box whether the applicant is a corporation, a partnership or proprietorship, an individual, a public housing authority or a property management corporation. In Toronto, the major public housing authority is the Ontario Housing Corporation - Metropolitan Toronto Housing Authority. a property management corporation does not “own” the rental property; it is retained by the owner to manage the property. A property management corporation qualifies and has the rights and duties of a “landlord” under the Landlord and Tenant Act. There is no requirement for a landlord which is a corporation to indicate whether or not is a property management corporation. There may be an indication of this in the name (eg. “XYZ Property Management Inc.”) or in the evidence (affidavits) filed. If the landlord is a corporation and you are uncertain about this, please indicate “unknown corporation”.

4. Representation

Indicate whether, at the time of commencement, the applicant is represented. If the applicant is represented, indicate whether the representative is a lawyer from a law firm, legal clinic, government or an agent.

If there is a change of solicitors or agents during the course of the litigation, this should be indicated.

5. Evidence filed with Application

The applicant may file evidence in affidavit form with the application. Please indicate if evidence is files.

The Respondent

6. Dispute

A person with an application will often not file a written dispute or response. A respondent may dispute the application by appearing personally or through a representative before the court registrar. One would hope that, if the respondent does not file a written dispute, but instead attends personally or through a representative to dispute the application, the registrar will make an endorsement or notation on the application form or somewhere else on the file. However, this may not occur.

7. Respondent

Notes under point 3 apply here.

8. If Respondent is Landlord

Notes under point 4 apply here.

9. Representation

Notes under point 5 apply here.

Nature of the Application

10. Application

Indicate the date the application was filed with the court.

11. Term of Tenancy Agreement

This information may be found on an attachment to the application, in an affidavit filed with the application or on a tenancy agreement filed with the application.

12. Address of Rental Premises

This information should be found on the application.

13. Rental Premises

The rental premises will usually be a building. Other types of real property rentals are also covered under the *Landlord and Tenant Act*. One of these is a mobile home park where the owner of the mobile home (tenant) leases the spot upon which the mobile home sits from the owner of the mobile home park (landlord). The other situation is a land lease community where owners of permanently situated houses (tenant) lease the land upon which the houses sit from another person (landlord). There is no requirement for the parties to state the type of rental premises. There may be an indication of the type found in the evidence (affidavits).

14. Case Type

A landlord can evict a tenant upon the authority of a court order called a "writ of possession". The landlord who applies for a writ must provide grounds for eviction that are specified in *Landlord and Tenant Act*. One or more grounds may be cited on an application. Check each of the grounds relied upon by the landlord if the application is for a writ of possession. Please check the appropriate box if the landlord is applying for relief other than a writ of possession.

If the tenant is the applicant, please check the appropriate box indicating the reason for the application. Most tenant applications will be for repairs of the rental premises or abatement of rent.

Nature of the Response

15. Court Filing Date

If there is a written dispute, indicate the date filed.

16. Counter Application

If the file is a landlord application, the tenant may also have complaints against the landlord. These complaints may be set out in a written response filed by the tenant or may be verbally communicated on an appearance before the registrar or judge. Technically, if the tenant has a complaint against the landlord in the course of a landlord application, the tenant should file a counter application (i.e. commence another legal proceeding). If there is a notation on the landlord application file that the tenant has commenced a counter application, please indicate. Please note that, although there may be technical procedural concerns, tenant complaints on a landlord application may be dealt with as part of the tenant's "response", effectively combining what should be two applications within one application.

**17. Registrar
Appearance**

The court registrar is a judicial officer having certain powers under the *Landlord and Tenant Act*. Generally, the registrar will dispose of applications unless the application is disputed by the filing of a written dispute or response or by the appearance of the respondent personally or through an agent. Most typically, the registrar will sign default orders when the application is not withdrawn and there is no dispute or there is no request for a consent order. If the application is disputed, the registrar will set the matter down for a hearing before a judge. In any event, there should be some registrar notation or endorsement on the file indicating that the matter has been determined at the registrar level, or the application is disputed and it is to be set down for a hearing before a judge.

**18. Set Aside
Motions**

A respondent against whom a default judgment has been made may make a motion to a judge to have the default judgment set aside. If a set aside motion is brought, there should be an endorsement made by a judge as to the disposition of the motion.

**19. Hearing Before
Judge**

If there was a hearing before a judge, this should be reflected somewhere on the file - it may be that the only evidence of this is an endorsement on the file by the judge hearing the matter. If the judge makes an order for a writ of possession, please check the box "tenancy terminated".

General Information

20. Date Hearings Began

21. Date Hearings Ended

22. Number of Days

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TOPIC III

THE ROLE OF THE CIVIL JUSTICE SYSTEM IN THE CHOICE OF GOVERNING INSTRUMENT

ADMINISTRATIVE AGENCIES EMPIRICAL STUDY

LAWRENCE M. FOX

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ADMINISTRATIVE AGENCIES EMPIRICAL STUDY*

LAWRENCE M. FOX

SECTION 1: INTRODUCTION

A. IMPETUS FOR THIS STUDY

The Fundamental Issues Group was asked to consider what types of disputes or issues are appropriate to different mechanisms of dispute resolution. Its Terms of Reference enjoined it to examine “the way in which various types of cases are processed within and/or outside of the courts”. Ontario’s vast and varied administrative system is undoubtedly the largest example of a system outside of courts that has been established for the purpose of dispute resolution. It constitutes an enormous system of “administrative justice”, which is part of the larger civil justice context in this province.

To address the allocational question of which disputes belong in which type of forum, it is necessary to develop some understanding of how the administrative system works in practice. To that end, the Fundamental Issues Group decided to undertake an empirical study of administrative decision-makers.¹ A comprehensive and detailed study of the entire administrative system could not be undertaken and, accordingly, a small number of agencies were selected for more detailed examination. It conducted detailed studies of the following:

- the dispute resolution scheme for statutory accident benefits (so-called “no fault”) under the *Insurance Act*;
- workers’ compensation (Workers’ Compensation Board, Workers’ Compensation Appeals Tribunal);
- employment standards (employment standards officers, and the Office of Adjudication);
- social assistance (Social Assistance Review Board);
- Ontario Human Rights Commission and the Board of Inquiry.

These examples were chosen for detailed study because they are highly visible and important agencies, whose decision-making powers affect many people. In addition, however, the Group decided to conduct a more general survey of over 45 other decision-makers. This paper provides an account of the results of these studies.

* Counsel, Policy Branch, Ministry of the Attorney General. I would like to express my thanks to our Branch’s articling students, Anne Marie Predko and Anna Myers, who assisted me in the laborious task of gathering information for this study. I would also like to thank the many people—members and staff of boards and tribunals—who generously assisted me, and without whom this research project would have been impossible to accomplish. Unfortunately, they are too numerous to name individually. I am deeply in their debt.

¹ The research for this paper was conducted during the period February - July, 1995. The information presented is intended to reflect the law and practice as of the end of June, 1995. Readers should be aware that the law or practice, or both, may have changed since then.

B. THE DATA

1. The Detailed Studies

Each of the studies is divided into five sections: (1) Mandate; (2) Process and Procedure; (3) Caseload; (4) Length of the Process; and (5) Access Issues. In some papers, information about budget or expenditure is presented in a separate section.

"Mandate" is a summary account of the decision-maker's statutory mandate. It generally describes the types of decisions that it makes. In the case of some administrative bodies—Ontario Human Rights Commission, Workers' Compensation Board, Workers' Compensation Appeals Tribunal, the Dispute Resolution Group—this discussion necessarily oversimplifies a very complex mandate.

The section on "Process and Procedure" describes the decision-making process that is followed within the administrative body. It comprehends an account of the various stages in the process,² and the procedures that are followed at each stage. Where applicable, the discussion notes the existence of pre-hearing procedures and "ADR measures". With the discussion of "Mandate", the "Process and Procedure" comprises the background to the ensuing discussion of caseload and the length of the process.

Where the information is available, the discussion of "Caseload" sets out data on the number of cases that enter the process, number of hearings held, number of decisions, and the number of dispositions (cases resolved, whether by decision or otherwise).³

Depending on the availability of information, the "Length of the Process" discusses how long the entire process takes from the initial filing that begins the process to the delivery of a decision. Where the information was provided, the discussion also presents information on how long each of the various stages takes.

Under the heading "Access Issues", several issues are addressed. Depending on the availability of information for a decision-maker, this section discusses: (1) the extent to which parties are represented; (2) the approach taken to fees, costs and expenses;⁴ (3) "geographical accessibility" (the extent to which there are regional or local hearing facilities); (4) accommodation of language and disability needs; (5) whether written reasons are provided; (6) whether decisions are published or otherwise made available to the public.

2. General Survey

The chart summarizing the data is organized under four headings: "Caseload", "Dispositions", "Length of time" and "Notes". With rare exceptions, decision-makers could

² However, not all of the decision-makers have levels or stages in their process. Many simply hold hearings: Social Assistance Review Board, Office of Adjudication under the *Employment Standards Act*, the Board of Inquiry under the *Human Rights Code*.

By contrast, the decision-making process of the Workers' Compensation Board involves several levels of decision, and the dispute resolution scheme for statutory accident benefits under the *Insurance Act* involves 3 stages: mediation, arbitration, and appeals from arbitration.

³ While cases may settle, they may also be abandoned or "drop out" of the system for other reasons.

⁴ "Fees" refers to charges that must be paid to obtain a hearing in an appeal, application or other proceeding. "Costs" refers to the litigation costs (including lawyers' and experts fees) that a board may order one party to pay to another. An administrative board has jurisdiction to order costs only if such authority is conferred by statute. "Expenses" refers to expenses associated with participating in the process.

not provide information about the cost of hearings, either on an aggregated basis or on a “per hearing” or “per hearing hour” basis. For that reason, the costs issue is addressed under “Notes”, which deals with a range of issues, including whether the decision-maker has adopted pre-hearing or ADR measures.

C. DISCUSSION

1. Importance of Context

In Ontario, hundreds of thousands of decisions are made by “administrative decision-makers”. Administrative decision-makers include individuals,⁵ as well as boards, commissions and tribunals. There is an extraordinary diversity in the types of decisions made by administrative decision-makers. Some handle disputes between private parties.⁶ Many, however, decide disputes between the government and individuals. Certain disputes are narrow, and more in the nature of a *lis*. Others involve complex, essentially policy decisions, in which public participation is considered critical to the hearing process and expert evidence is important.⁷ Many decision-makers operate within relatively narrow regulatory contexts, making decisions *directly* affecting only those whose conduct is regulated. Schemes that require licensing or registration, or involve professional regulation and agricultural marketing are of this nature. Other decision-makers operate within legislative schemes that apply generally.⁸ Finally, certain decision-makers administer benefit, compensation or insurance schemes; examples include the Workers Compensation Board, Criminal Injuries Compensation Board, and the Ministry of Community and Social Services in its administration of the *Family Benefits Act*.

For the most part, this study focuses on decision-makers that conduct oral hearings in order to make their decisions. However, it also comprehends the Workers’ Compensation Board, the Ontario Human Rights Commission, and the Employment Practices Branch of the Ministry of Labour, where this is not the case. It bears emphasizing that this study does not present data about all the decision-makers that hold hearings in Ontario. Certain bodies did not respond to our inquiries. Excluded are bodies within self-regulatory professions that conduct hearings⁹ and agricultural marketing boards.

⁵ Under the *Rent Control Act, 1992*, the “Chief Rent Officer” and rent officers decide disputes relating to rents, appeals from Ministry orders and matters referred to them by the Minister. The Mining and Lands Commissioner determines disputes under many Acts. Adjudicators decide appeals from orders given by inspectors under the *Occupational Health and Safety Act*. Referees and adjudicators decide appeals from orders given by employment standards officers under the *Employment Standards Act*.

⁶ Examples include the Mining and Lands Commissioners, Ontario Farm Implements Board, the Dispute Resolution Group that handles disputes about statutory accident benefits under the *Insurance Act*.

⁷ Examples of broadly participatory hearings include assessment hearings held by the Environmental Assessment Board, rate hearings held by the Ontario Energy Board, and Ontario Municipal Board hearings on official plans.

⁸ For example, the *Occupational Health and Safety Act* and the *Employment Standards Act* apply to all employers (save for those under federal jurisdiction). The *Building Code Act* and the *Rent Control Act, 1992* apply generally to building standards and rents, respectively.

⁹ However, we have gathered information about the Health Professions Board, which conducts registration hearings, registration reviews and complaint reviews relating to decisions of the registration and complaint committees of the councils of the many regulated health professions and the College of Veterinary Surgeons. Within each of the self-

It is difficult to draw general conclusions about caseload and delay from the data that has been gathered in this paper. The study surveys numerous decision-makers, many of which differ from each other in important respects, including the issues they determine and the larger regulatory or other context in which they function. Nonetheless, it is possible to offer certain observations that will assist a review of the information and place it in context.

First, many administrative decision-makers that hold hearings to make decisions have been created for that purpose alone, and it is the only function that they discharge. Their hearings may address a relatively narrow issue or involve a broad-ranging inquiry. Examples of the former include administrative boards that conduct appeals or reviews of (1) proposals to deny or cancel benefits (for example, Social Assistance Review Board, Ontario Student Assistance Program Appeal Board, Health Services Appeal Board), (2) proposals to deny or cancel a licence or registration that is needed to carry on a certain business (for example, Commercial Registration Appeal Tribunal,¹⁰ Farm Products Appeal Tribunal, Health Facilities Appeal Board), (3) orders that enforce prescribed standards (for example, Environmental Appeal Board, Fire Code Commission, and the Office of Adjudication, which hears appeals under the *Employment Standards Act* and the *Occupational Health and Safety Act*).¹¹ Generally, these decision-makers depend on the parties to present evidence in the hearing, and have no independent means of gathering information on their own. Notable exceptions are the Workers' Compensation Appeals Tribunal, which dedicates substantial resources to pre-hearing inquiries and post-hearing investigations, and the Criminal Injuries Compensation Board, which conducted 1,000 investigations in the 1994-95 fiscal year.

By contrast, other bodies (Ontario Energy Board, Environmental Assessment Board) have been expressly created primarily to hold hearings on more wide-ranging issues, in which public participation is considered essential. The Ontario Municipal Board holds hearings under more than 150 statutes, and deals with both narrow and broad issues. It also exercises an appellate jurisdiction in relation to decisions of the Assessment Review Board.

While many bodies function only by holding hearings,¹² other administrative boards and commissions have a wide mandate comprehending a range of functions, of which the conduct of hearings is but one. It seems that there are two general types of board in which this is the case. One type might be classified as a board responsible for "comprehensive regulation" in a particular area: this may involve the board in standard-setting, explicit policy-making, licensing and discipline of those it regulates, investigations, "quasi-criminal" prosecutions, and holding administrative hearings. The Ontario Securities Commission ("OSC"), Liquor Licence Board of Ontario ("LLBO"), Ontario Insurance Commission ("OIC"), and the Pension Commission of Ontario ("PCO") fall into this category. In the case of the OSC, PCO, and the

regulatory professions, more than one committee or body usually makes decisions and holds hearings. A survey of them would have added more than 100 more decision-makers to this study.

¹⁰ The Commercial Registration Appeal Tribunal hears other matters as well: for example, appeals under the *Ontario New Home Warranties Plan Act*, and appeals relating to the Travel Industry Compensation Fund, Motor Vehicles Dealers Compensation Fund and the Prepaid Funeral Compensation Fund.

¹¹ While most of these decision-makers hear appeals or reviews relating to decisions or proposals of provincial officials, some deal with decisions made by municipal officials. For example, the Social Assistance Review Board hears appeals under the *General Welfare Assistance Act* from municipal decisions.

¹² Bodies that were created solely for the purpose of holding hearings may, of course, adopt measures that will facilitate resolution of the issues or settle the dispute altogether, avoiding a hearing.

OIC,¹³ the conduct of hearings is a very minor part of their many important regulatory activities. For the LLBO, conducting hearings is a small part of its mandate.

Labour relations tribunals also have several functions. Typically, they do more than adjudicate workplace disputes. The Ontario Labour Relations Board certifies unions, appoints mediators and, for the construction industry, hears grievances. Both the College Relations Commission¹⁴ and the Education Relations Commission¹⁵ perform several functions, including monitoring negotiations, training third-party neutrals (mediators, fact finders, arbitrators), and collecting and disseminating statistical information. The Grievance Settlement Board, which adjudicates disputes between public sector employee organizations and the provincial government, also provides mediation services.

2. Caseload

Among the many administrative bodies surveyed in this study, there is a great variation in caseloads. Fifteen appear to receive less than 20 new cases annually.¹⁶ Six seem to receive 20-50 new matters a year,¹⁷ six receive between 50 and 100 matters annually.¹⁸ The Ontario Racing Commission scheduled 110 hearings in 1994.

On the other hand, several of the administrative decision-makers that we surveyed have enormous caseloads. In 1994, the Workers' Compensation Board received approximately

¹³ We are here referring to the Ontario Insurance Commission in its capacity as regulator of the insurance industry, and not to its role in dispute resolution of statutory accident benefits.

¹⁴ Under the *Colleges Collective Bargaining Act*, the CRC is responsible for labour relations relating to community colleges.

¹⁵ Under the *School Boards and Teachers Collective Negotiations Act*, the ERC is responsible for labour relations between school boards and teachers.

¹⁶ Environmental Assessment Board, Farm Products Marketing Commission, Ontario Provincial Police Grievance Board, Nursing Home Review Board, Laboratory Review Board, Health Facilities Appeal Board, Hospital Appeal Board, Fire Code Commission, Special Education Tribunal (English), Special Education Tribunal (French), Education Relations Commission, Ontario Civilian Commission on Police Services, Ontario Securities Commission, Pension Commission of Ontario, Ontario Student Assistance Plan Appeal Board.

Several of these—Ontario Provincial Police Grievance Board, Nursing Home Review Board, Laboratory Review Board, Health Facilities Appeal Board, Hospital Appeal Board, Special Education Tribunal (English), Special Education Tribunal (French)—have negligible caseloads.

¹⁷ In 1993-94, 40 appeals were filed with the Farm Products Appeal Tribunal. The Ontario Drainage Tribunal received 33 and 34 appeals in 1993 and 1994, respectively. In 1994-95, the Crop Insurance Arbitration Board received 30 requests for arbitration; requests have ranged from 20 to 30 annually. The Licence Suspension Appeal Board received 32 and 35 cases in 1993-94 and 1994-95, respectively. The Public Service Grievance Board received 78 and 34 applications in 1993-94 and 1994-95, respectively. The Child and Family Services Review Board received between 34 and 48 appeals from 1989-90 to 1992-93, and 66 in 1993-94.

¹⁸ The Mining and Lands Commissioner averaged 53 new files per year for the years 1991-94. In 1994, 58 matters were filed with the Building Code Commission. The Ontario Energy Board received 44 and 74 new matters in 1993-94 and 1994-95, respectively. The Ontario Farm Implements Board received 86 and 78 applications in 1992-93 and 1993-94, respectively. The Pay Equity Hearings Tribunal had 70 new cases in 1993-94 and 57 in 1994-95.

The Custody Review Board received 68 and 72 applications in 1992-93 and 1993-94, respectively. The Board, it should be noted, does not make decisions. It reviews custody placement decisions made by the Provincial Director, in the course of which it may hold a hearing. It may make a recommendation.

375,000 claims, which initially are determined administratively, without any form of oral hearing, and then are subject to a multi-level internal review process. The Assessment Review Board conducts hearings concerning real property assessment complaints, municipal tax applications and other matters. It received approximately 300,000 new cases in 1993, and 190,000 new cases in 1994.

While not receiving comparable volumes of new cases annually, other administrative decision-makers have very large caseloads. In the past two fiscal years, employees have filed over 18,000 claims of *Employment Standards Act* violations with the Ministry of Labour. The Social Assistance Review Board, which hears appeals under the *General Welfare Assistance Act*, the *Family Benefits Act* and the *Vocational Rehabilitation Services Act*, received more than 11,000 new cases in 1994-95. The Dispute Resolution Group of the Ontario Insurance Commission, which administers the dispute resolution process for statutory accident benefits, received over 5000 applications for mediation in 1993-94 and 8440 in 1994-95. The Ontario Labour Relations Board received approximately 3800 new cases in 1992-93 and approximately 4500 in 1993-94. The Criminal Injuries Compensation Board received 3880 new applications in 1993-94 and 4474 in 1994-95. The Grievance Settlement Board received over 2000 applications in the past two fiscal years. In 1993-94, the Ontario Municipal Board received approximately 3900 applications, appeals and referrals. The Workers' Compensation Appeal Tribunal received over 2000 appeals in both 1993 and 1994. The Ontario Human Rights Commission received over 2000 new cases annually for the past four fiscal years. The Ministry of Labour's Office of Adjudication received approximately 1000 appeals in each of 1993 and 1994, most of which were under the *Employment Standards Act*.

The Commercial Registration Appeal Tribunal received 449 and 330 new cases in 1993-94 and 1994-95, respectively. Over one-third of its 1993-94 caseload and one-half of its 1994-95 caseload related to decisions made under the *Ontario New Home Warranties Act*. The Liquor Licence Board of Ontario issued 520 notices proposing review of licences or disciplinary action in 1993-94, most of which led to hearings. Over 350 applications were filed with the Ontario Highway Transport Board in 1994; most were unopposed and approved without a hearing. The Health Professions Board received over 200 new cases annually in 1993 and 1994.

Conclusions should not be drawn about the "workload" of an administrative decision-maker from this information alone. First, new cases are added to the remaining cases from previous years.¹⁹ More importantly, excluding boards and commissions that have a negligible caseload,²⁰ incoming caseload must be considered in light of the specific mandates of the decision-makers, the nature and complexity of the issues they determine, the context in which they function, and the resources at their command.²¹ For example, as noted earlier, for certain regulatory commissions—the OSC, OIC and PCO—hearings play a very small role in discharging their mandates.

¹⁹ Cases may not be completed in the fiscal or calendar year in which they are commenced for various reasons. They be commenced at the end of the year, and carried over to the next year for that reason alone. The length of the process of administrative decision-makers varies considerably: see discussion below.

²⁰ See footnote 16 *supra*.

²¹ The number of members of boards, tribunals and commissions vary. Some consist entirely of full-time members; others consist only of part-time members. Others consist of a mixture of both.

The example of the Environmental Assessment Board well illustrates the need to be cautious in interpreting incoming caseload data. The EAB received 18 new applications in 1993 and 11 in 1994. In terms simply of the volume of "new cases", these numbers are dwarfed by the volume of new cases filed with other decision-makers, including those that hold oral hearings. However, some environmental assessment hearings are very complex and lengthy proceedings, which involve difficult issues, the participation of several intervenors, and the presentation of voluminous technical and scientific evidence. Hearings may require months, or even years, of hearing time, with lengthy adjournments to allow the parties to prepare their cases.

The caseload of administrative decision-makers conducting appeals or reviews of decisions made or proposed by "lower level" authorities is directly affected by changes below, whether in the substantive criteria governing decisions or in the extent of enforcement or other activity. This is most evident in entitlement schemes that give beneficiaries the right to challenge decisions affecting their rights to a benefit or entitlement. For example, the Workers' Compensation Appeals Tribunal has seen its caseload increase significantly over the past five years,²² a phenomenon partially attributable to an increasing number of decisions made by the Workers' Compensation Board. Similarly, the caseload of the Social Assistance Review Board increased each year during the past five years. While, in part, this reflected economic conditions, which led to more people applying for and receiving benefits under the *General Welfare Assistance Act* and the *Family Benefits Act*, other factors also had an impact. Regulation changes under the *General Welfare Assistance Act* and the *Family Benefits Act* reduced payment rates for sponsored immigrants. Administrative officials adopted enhanced verification procedures, involving more frequent monitoring, for permanently unemployable and disabled cases.

More dramatic change was experienced by the Health Services Appeal Board, which hears appeals from decisions made by the general manager of the Ontario Health Insurance Plan ("OHIP") respecting payment for medically necessary services and practitioner billings. In 1994, the government made substantive changes to the legislation governing eligibility for OHIP and out-of-country benefits. This led to a 1400% increase in the number of appeals filed, and a 240% increase in the number of appeals scheduled for hearing.²³

It should also be appreciated that, to the extent that a Ministry or other authority imposes a greater number of administrative sanctions—whether in the form of a proposal to revoke a licence or an order—it may increase the caseload of the administrative board or tribunal that has been created to hear appeals from sanctions.

3. Duration of the Process

The same factors that urge caution in dealing with "caseload data" apply to information about "dispositions" and the length of time that it takes a case to "travel" through a decision-maker's process. In the case of some tribunals, it generally takes less than three months for an

²² In 1993 and 1994, there were over 2100 incoming cases annually. In 1990 and 1991, there were less than 1600 new cases annually.

²³ However, 41% of the new appeals were withdrawn, due mainly to OHIP re-instating coverage.

application to be filed, heard and decided, with reasons issued to the parties.²⁴ For others, the usual period is 3-6 months.²⁵ The process of a number of administrative decision-makers takes longer than six months from commencement to the rendering of a decision.²⁶ Indeed, for some, the entire process may take over a year.

The duration of the overall process is naturally affected by the specific mandates of the decision-makers and the nature of the issues that they confront. It may also be relevant whether the parties are represented. The hearings themselves also vary greatly in length. While a hearing about an official plan before the Ontario Municipal Board may take more than one year, other OMB hearings before the Board may take an hour or less. Quite apart from the hearings, certain bodies—such as the Ontario Human Rights Commission, the Criminal Injuries Compensation Board, Workers' Compensation Board and the Workers' Compensation Appeals Tribunal—engage in investigative activities, which prolong the overall process. Medical disability issues, of the kind considered by the Dispute Resolution Group, Workers' Compensation Board and the Workers' Compensation Appeals Tribunal, not only require the collection of expert medical evidence, but may entail a period to determine whether a medical condition exists. Proceedings before the Environmental Appeal Board and the Environmental Assessment Board may involve lengthy pauses, during which the parties prepare their cases, conduct scientific or other studies or negotiate. This may lead to a longer time period before the hearing commences, but may shorten the actual hearing.

It is important to emphasize that not only do the length of the process and the duration of the hearing vary among the various administrative decision-makers, but, in some cases, they vary with the type of issue decided by an individual decision-maker. In the case of the Assessment Review Board, contested municipal tax applications take two months from the receipt of the application to issuance of the decision. However, assessment complaints take seven months, with more complex complaints requiring more time to conclude. The processing times for matters heard by the Ontario Labour Relations Board vary with the type of case. Hearings before the Commercial Registration Appeal Tribunal range from one-half day to several weeks, depending on the complexity of the issue, the number of witnesses and whether parties are represented. The length of the process before the Environmental Assessment Board, Ontario Energy Board and the Environmental Appeal Board varies considerably with the matter in issue. This phenomenon is evident also in the Workers' Compensation Board and the Workers' Compensation Appeals Tribunal.

²⁴ For example, Ontario Labour Relations Board, Farm Products Appeal Tribunal, Farm Products Marketing Commission, Crop Insurance Arbitration Board, Building Code Commission, Ontario Racing Commission, Ontario Farm Implements Board, Fire Code Commission, Insurance Commissioner, Insurance Superintendent, Education Relations Commission.

²⁵ For example, Commercial Registration Appeal Tribunal (3-6 months), Ontario Drainage Tribunal (4 months), Ontario Highway Transport Board (16 weeks), Liquor Licence Board of Ontario (average 185 days, but varies with the issue).

²⁶ For example, Assessment Review Board (assessment complaints), Mining and Lands Commissioner (average 6 months, but some take more than 1 year to resolve), Ontario Energy Board (average 8.5 months in rate cases), Office of Adjudication (range 6 to 9 months).

4. Innovation and Transition

The “world” surveyed by this study is in a state of transition. A number of administrative decision-makers have introduced innovations in case management, pre-hearing meetings and alternative dispute resolution.

As with other issues, it is important to consider these procedural innovations in context. For example, there may be little interest in having a decision-maker supervise or approve settlements of disputes between private parties. The issues raised by such disputes differ fundamentally from the public interest issues at stake in a major environmental assessment hearing or an Ontario Hydro rate application. Accordingly, the Environmental Assessment Board and the Ontario Energy Board do not simply accept settlements to which the parties agree, but must be persuaded that they are in the public interest before they approve them.²⁷ Similarly, while mediation is an essential feature of several administrative schemes—notably in the labour relations context and under the statutory accident benefit dispute resolution scheme in the *Insurance Act*²⁸—it may not be equally suitable for all disputes. Neither the Assessment Review Board nor the Social Assistance Review Board considers it appropriate for their hearings.

In 1994, there were important legislative changes to procedures. The *Statute Law Amendment Act (Government Management and Services), 1994*²⁹ made significant amendments to the *Statutory Powers Procedure Act*, some of which anticipate that tribunals will make further procedural changes. This involved the first substantive amendments to the SPPA since it came into force over twenty years ago. Among the numerous changes were amendments that empower tribunals to make rules allowing them to hold written hearings and electronic hearings and permitting them to direct the parties to participate in pre-hearing conferences. In 1994, the *Workers' Compensation Act* was amended to require the Workers' Compensation Board to offer mediation services in connection with objections relating to re-employment and vocational rehabilitation benefits.³⁰

D. FUTURE DATA COLLECTION

In conducting the research for this study, it became evident that there is great range in the kind and detail of information collected by administrative decision-makers. Some compile detailed data about caseloads, dispositions, and the time that it takes to “process” a matter. Others keep basic information about caseloads and dispositions, but do not “keep track of” processing time. In many cases, respondents were likely providing their best estimates of the time it took for a case to go from commencement to resolution because they do not record such information. Greater uniformity in these matters would obviously be desirable.

²⁷ See Ontario Energy Board, Board Procedural Order, and Environmental Assessment Board, *Protocol for Consideration of Agreements Among Parties*.

²⁸ Other decision-makers that use mediation include the Ontario Farm Implements Board, Ontario Municipal Board, Workers' Compensation Board. The Ministry of Labour provides mediation services in relation to complaints about violations of the *Employment Standards Act*.

²⁹ S.O. 1994, c. 27. These amendments came into force on April 1, 1995.

³⁰ S.O. 1994, c. 24, s. 22. These amendments came into force on April 3, 1995.

It must be remembered, however, that Ontario decision-makers vary greatly in their annual budgets, staff complements, and financial and other resources. Some have sophisticated computer systems (Ontario Insurance Commission, Social Assistance Review Board, Workers' Compensation Appeals Tribunal), while others rely on manual records. Even those that have computer systems no doubt have had them designed to serve their own case management and other goals, and to generate information to serve their own particular needs. A number of boards, commissions and tribunals have part-time members only or a combination of full-time and part-time members. Finally, the processes of the decision-makers are not uniform. While many simply hold hearings, others have more complex processes involving investigations or levels of decision-making.

Accordingly and, particularly in light of the disparity in resources among the administrative decision-makers, I suggest that a strategy for developing improved and more uniform data collection should be developed in consultation with the decision-makers themselves.

It would also be very desirable to develop a strategy for gathering useful statistical data about the administrative sector, which could inform future policy work about particular decision-makers and the administrative justice system more generally. In light of the factors identified above, it would be preferable if this strategy were to evolve out of a consultative process that would involve representative decision-makers, government ministries, and Management Board Secretariat.

SECTION 2: THE STATUTORY ACCIDENT BENEFITS SCHEME UNDER THE INSURANCE ACT

A. MANDATE

The statutory benefits dispute resolution process under the *Insurance Act*³¹ ("Act") applies to disputes about automobile accident claims relating to personal injury. Such claims typically concern income replacement and supplementary medical and rehabilitation benefits.³² Claims for property damage or other types of damages are not comprehended by the dispute resolution process.

The Dispute Resolution Group of the Ontario Insurance Commission ("OIC") administers the former No-fault Benefits Schedule and the Statutory Accident Benefits Schedule. The initial No-fault Benefits Schedule was introduced in 1990; the Statutory Accident Benefits Schedule came into effect on January 1, 1994.

The Dispute Resolution Group is responsible for three main functions in relation to a dispute arising from an insurer's denial of a claim: mediation, arbitration, and appeal. Different individuals are responsible for each of these functions. All of them are members of the Dispute Resolution Group and full-time employees of the OIC.

The Insurance Commissioner appoints the mediators and the arbitrators; the latter are appointed on the recommendation of the Accident Benefits Advisory Committee ("ABAC"). However, the Director of Arbitrations ("Director") is responsible for assigning cases to

³¹ R.S.O. 1990, c. I.8.

³² The discussion draws heavily on Sachs, "Dispute Resolution in a Statutory Accident Benefits Compensation Scheme: The Ontario Model" (1994), 17 Adv. Q. 218. Elisabeth Sachs is the Director of Arbitrations and the Executive Director of the Dispute Resolution Group.

mediators and arbitrators. The ABAC is also responsible for advising the Insurance Commission on arbitration procedures.

The Director of Arbitrations, or his or her delegate, is responsible for hearing appeals from arbitration decisions.

B. PROCESS AND PROCEDURE

1. Outline

The dispute resolution process within the OIC conceivably may involve three stages: mediation; arbitration; and appeal. Procedures are governed by the Act and its regulations,³³ the *Dispute Resolution Practice Code*³⁴ and, in the case of arbitrations and appeals, the *Statutory Powers Procedure Act* ("SPPA"). The system is fully automated and case-managed.

It also bears noting that, since January 1, 1994, all settlements of disputes have had to meet standards prescribed by regulation, if they are not to be void.³⁵ The regulation applies throughout the dispute resolution process and to settlements related to proceedings in court.

2. Mediation

Either an insured or an insurer may apply for the appointment of a mediator if there is a dispute about a claim. Mediation is mandatory in the sense that a party may not proceed to another stage unless mediation has been tried and failed. A mediator is appointed within 2 working days of the filing of the application for mediation.

There is a time limit on mediations: the mediator has 60 days to try to effect a settlement from the date of filing of the application, unless the parties agree to extend the time for completion of the mediation process beyond the expiry date.³⁶

Mediation sessions may be conducted entirely by telephone or in person with both of the parties in attendance. The mediator has the authority to determine how mediation services will be provided. Most mediations are held by telephone. Mediation is confidential among the mediator and the parties; what transpires is not communicated to an arbitrator, the Director on an appeal, or the court.

Mediation is "completed" when there is a settlement or mediation fails. A mediation fails when no settlement has been reached within the prescribed or agreed upon deadline or when the mediator notifies the parties of his or her opinion that the mediation will fail.

When a mediation is completed, the mediator files a Report of Mediator with the OIC, and copies of it are sent to the parties. The Report outlines the issues that are resolved, and describes the issues that remain unresolved, together with the insurer's last offer.

³³ R.R.O. 1990, Reg. 664, O. Reg. 220/91; O. Reg. 780/93; O. Reg. 850/93.

³⁴ The *Dispute Resolution Practice Code* has been developed pursuant to the authority of the Director of Arbitrations to make rules under s. 12 of the *Insurance Act*.

³⁵ *Insurance Act*, *supra*, note 31, s. 279(2), as am. by S.O. 1993, c. 10, s. 32(1). O. Reg. 780/93 deals with settlement.

³⁶ *Insurance Act*, *supra*, note 31, s. 280(4) and (5); R.R.O. 1990, Reg. 664, s. 10; *Dispute Resolution Practice Code*, ss. 3 and 4.

If issues are still in dispute, an insured person may choose to continue by applying for an arbitration with the OIC or by bringing a proceeding in court. Where an insurer wishes to continue, its only recourse is to commence a court action.

The salary cost of a mediation to the OIC is approximately \$300.

3. Arbitration

An insured person may file an application for the appointment of an arbitrator within 2 years of the insurer's denial of a benefit or within 90 days of the mediator's report (whichever is longer), accompanied by a non-refundable fee of \$100. The responding insurer that is party to the arbitration is assessed and required to pay \$2,000, which is generally not refundable.

Within 5 days of the filing of the application, 2 arbitrators are appointed. One arbitrator is appointed to conduct the arbitration hearing; a second arbitrator is assigned as a pre-hearing arbitrator.

The *Dispute Resolution Practice Code* addresses the procedure governing arbitration in some detail, dealing with such matters as pleadings and time limits for the various steps in the process. The *Arbitration Act, 1991*³⁷ does not apply to these arbitrations.

Arbitrations involve oral hearings unless the parties waive their rights to such a hearing in writing.

The arbitration process is subject to time limits. Where an oral hearing is waived, the arbitration must be completed within 30 days after the last day on which the final pleading was to be filed. Where an oral hearing is not waived, the hearing date must not be more than 60 days after the last day on which the final pleading was to be filed unless the parties consent.

The salary cost of an arbitration to the OIC is approximately \$2,000.

(a) Pre-Hearing Discussions

Generally, pre-hearing discussions are held by meeting or by telephone. The pre-hearing arbitrator has authority to determine the method. Most are conducted by telephone.

The pre-hearing discussion has several purposes: to settle the dispute; to deal with preliminary objections and procedural issues; and to "clarify the issues, obtain agreement as to facts, and ensure that all the relevant evidence and documentation...has been disclosed and exchanged".³⁸ At the pre-hearing, a date for the arbitration hearing is set, which is usually about two months later.

(b) Arbitration Hearing

The procedure for arbitrations is governed by the Act and its regulations, the *Dispute Resolution Practice Code*, and the SPPA.

Certain questions may be referred to advisory panels for study and report. On the recommendation of an arbitrator, the Director must refer questions related to the medical condition, treatment, or rehabilitation of an insured to the chair of the Medical and

³⁷ S.O. 1991, c. 17.

³⁸ Sachs, *supra*, note 32, at 229.

Rehabilitation and Advisory Panel.³⁹ The chair then appoints the appropriate panel member (known as an “advisor”) to conduct a medical or rehabilitation assessment. An advisor may require the insured person to be examined, in which case the insurer pays for the examination. The advisor submits his or her report to the OIC, and copies of it are sent to the arbitrator and the parties.

4. Appeals to the Director from Arbitration

Either the insured or the insurer may appeal an arbitrator’s decision to the Director upon payment of the \$250 filing fee. Insurers must also pay an assessment of \$500.

An appellant must file a Notice of Appeal within 30 days of the arbitrator’s order unless the Director extends the time. Within 15 days of filing, the appellant must serve on the parties and the OIC materials and submissions that will be used at the appeal. A respondent must serve a Response to Appeal within 20 days of being served with the Notice of Appeal.

The Director may determine the appeal on the record or by rehearing all the issues that were before the arbitrator, or partly by relying on the record and partly by a rehearing.⁴⁰

Essentially, the Director follows a two-step process in dealing with appeals. The first stage involves a consideration of written submissions or oral argument on the question of whether there should be a rehearing on any of the issues. If the Director decides that a rehearing is warranted, the second stage is the rehearing itself. To date, the Director has not yet held a rehearing on all the issues.

The process for presenting oral argument at the initial stage and at the rehearing is governed by the SPPA, the Act and its regulations, and the *Dispute Resolution Practice Code*.

There are no appeals from orders of the Director. The only recourse available to a disappointed party is to seek judicial review by the court.

The Director need not personally conduct an appeal; she may appoint a delegate to do so on her behalf.

5. Variation and Revocation⁴¹

An insured person or the insurer may apply to the Director to vary or revoke an order of an arbitrator or a previous order of the Director. As in the case of appeals, there is a \$100 filing fee and insurers must pay an \$500 assessment. Where the application relates to an arbitrator’s order, the Director may decide the matter or appoint the same arbitrator or another arbitrator to determine it.

An arbitrator’s order may be varied or revoked only where the material circumstances of the insured have changed, there is evidence now available that was not available on the arbitration or appeal or there is an error in the previous order.

The procedure is very similar to that governing appeals to the Director.

³⁹ The panel is appointed by the Insurance Commissioner. Its mandate is to advise the Director and arbitrators: *Insurance Act, supra*, note 31, s. 10.

⁴⁰ *Ibid.*, s. 283(4).

⁴¹ *Ibid.*, s. 284.

C. CASELOAD

1. Mediation

From April 1, 1992 to March 22, 1995, 15,500 applications for appointment of a mediator were filed; over 96% (14,955) were filed by insured individuals. Insurers filed 545.

In this period, 7307 mediations resulted in full settlements, 3284 mediations resulted in partial settlements, and 14,426 mediations were closed. "Closed" means that the file is disposed of: by the file being "completed"⁴² or for another reason.⁴³

In the 1991-92 fiscal year, 1,483 applications for mediation were filed, and 1,171 mediations were closed.⁴⁴ In the 1992-93 fiscal year, 2,763 applications for mediation were filed, and 2,571 mediations were closed.⁴⁵

In the 1993-94 fiscal year, over 5,000 applications for mediation were filed.⁴⁶ In the 1994-95 fiscal year, over 8,440 applications for mediation were filed.

The issues most commonly in dispute are weekly income, supplementary medical benefits, interest on unpaid amounts, child care, and care benefits.

2. Arbitration

From April 1, 1992 to March 22, 1995, 2001 applications for the appointment of an arbitrator were filed by insured individuals. Insurers cannot resort to arbitration if a mediation is unsuccessful; their only recourse is the courts.

Approximately 75% of the cases for which there has been an application for arbitration are not heard and ultimately decided by the arbitrator. Some cases are abandoned; others are settled by the parties on their own; cases may settle with the intervention of an arbitrator at the pre-hearing or during the arbitration hearing. The settlement rate of pre-hearings is approximately 50% of the matters for which arbitration has been requested.⁴⁷

Virtually all arbitrations are conducted by oral hearing.

In the 1991-92 fiscal year, 101 applications for arbitration were filed; 47 arbitrations were closed.⁴⁸ In the 1992-93 fiscal year, 287 applications for arbitration were filed; 144 arbitrations

⁴² See discussion of "completion", *supra*.

⁴³ The OIC may be informed by the insurer that it has no record of the person being covered by a policy of insurance, or the insured may abandon the matter.

⁴⁴ Ontario Insurance Commission, *Annual Report 1991-92*, at 11.

⁴⁵ Ontario Insurance Commission, *Annual Report 1992-93*, at 11.

⁴⁶ Ontario Insurance Commission, *Annual Report 1993-94*, at 15.

⁴⁷ Sachs, *supra*, note 32, at 221.

⁴⁸ Ontario Insurance Commission, *Annual Report 1991-92*, at 11. "Closed" means that the arbitration is disposed of. This would include arbitrations that are heard and decided, arbitrations that are settle before or during the hearing itself, and arbitrations that are abandoned.

were closed.⁴⁹ In the 1993-94 fiscal year, 673 applications for arbitration were filed; 338 arbitrations were closed.⁵⁰

3. Appeals to the Director from Arbitration

From April 1, 1992 to March 22, 1995, 119 appeal applications were filed; 74 of them were filed by insured individuals and 45 by insurers. In this period, 35 appeals were completed, and 5 were settled and withdrawn.

From April 1, 1992 to March 22, 1995, the Director heard oral submissions as to whether there should be a rehearing in 28 appeals. In 2 appeals, she dealt with this issue based on the record alone.

In the 1991-92 fiscal year, 13 appeal applications were filed; 2 appeals were closed.⁵¹ In the 1992-93 fiscal year, 15 appeal applications were filed; 13 appeals were closed.⁵² In the 1993-94 fiscal year, 40 appeal applications were filed; 9 appeals were closed.⁵³

4. Variation and Revocation

From April 1, 1992 to March 22, 1995, 6 variation/revocation applications were filed, of which 1 was filed by an insured and 5 by insurers.

D. LENGTH OF THE PROCESS

In the period from April 1, 1992 to March 22, 1995, the average period from the filing of the application for mediation to the rendering of the decision on appeal was 602 days. The average file took 62 days from the issue of the appointment of the mediator to the issue of the mediator's report. The average file took 119 days from receipt of the application for arbitration to the date of the arbitration hearing. The average arbitration hearing was 1.5 days.

In the period from January 1, 1993 to March 7, 1994, the average number of days from the conclusion of the arbitration hearing to the issuance of the decision by the arbitrator was 102 days.

In the period from April 1, 1992 to March 22, 1995, the average period from the end of the hearing of the appeal by the Director to the issuance of the decision on the appeal was 183 days.

E. ACCESS ISSUES

1. Representation

The chart below shows that the use of counsel increases as the claim proceeds through the dispute resolution process.

⁴⁹ Ontario Insurance Commission, *Annual Report 1992-93*, at 11.

⁵⁰ Ontario Insurance Commission, *Annual Report 1993-94*, at 15.

⁵¹ Ontario Insurance Commission, *Annual Report 1991-92*, at 11.

⁵² Ontario Insurance Commission, *Annual Report 1992-93*, at 11.

⁵³ Ontario Insurance Commission, *Annual Report 1993-94*, at 16.

Percentage of Claims Where Parties Use Counsel

Party	Mediation	Arbitration	Appeal
Insured	68%	77%	79%
Insurer	11%	89%	99%

2. Fees, Expenses and Costs

Fees

Insured individuals must pay application fees for arbitrations (\$100) and appeals (\$250); there is no fee for mediations. Insurers are subject to "assessments" when they are parties to an arbitration (\$2,000) or appeal (\$500). Application fees and assessments are collected by the OIC and paid into the Consolidated Revenue Fund.

Costs, Expenses

The rules governing the recoverability of costs and expenses differ for insured persons and insurers. The rules apply to arbitrations, appeals and applications for variation or revocation.

Arbitrators and the Director have a discretion to award expenses to the insured person according to a schedule set out in the regulations.⁵⁴ Regardless of the outcome of the proceeding, insurers are generally required to pay the claimant's expenses, "so long as the applicant has presented a reasonably arguable claim, has not abused the process or unduly prolonged it".⁵⁵

An insurer may recover an amount from an insured up to the amount paid as an assessment if the insured has commenced an arbitration or appeal "that, in the opinion of the arbitrator [or Director] is frivolous, vexatious or an abuse of process".⁵⁶

Accordingly, the liability for expenses of an insured is limited by the amount assessed against the insurer, while his or her right to recover from the insurer is considerably broader.

3. Geographical Accessibility

Mediators are located at the Commission's offices. They generally do not travel from the office, since the mediation system has been designed to be "telephone-based". Mediators conduct in-person mediations where claimants are disabled or in serious cases where settlement is more likely if the mediator attends personally.

11 arbitrators are also located at the Commission's offices. Generally, they travel to the regional centre nearest the claimant. As a pilot project, the Commission had engaged a roster of arbitrators in eastern and southwestern Ontario to conduct arbitration hearings in the Ottawa and Windsor areas, respectively. The project ended June 30, 1995.

In the case of appeals to the Director or her delegate, oral arguments are usually presented at the Commission's offices or conducted by conference call, although they may be heard at the regional centre nearest the appellant.

⁵⁴ Under the regulation, the recoverable expenses include legal fees and other expenses at the Legal Aid rate, filing fees, disbursements, witnesses fees, costs for the attendance of expert witnesses and their reports, travel and other expenses.

⁵⁵ Sachs, *supra*, note 32, at 237.

⁵⁶ *Insurance Act*, *supra*, note 31, ss. 282(11.2) and 283(7), as enacted by S.O. 1993, c. 10, ss. 33 and 34.

4. Language/Accommodation

Mediations, arbitrations and appeals can be held in either English or French. The OIC will provide interpreters for people who are unable to understand English or French at arbitrations and appeals; interpreters are not provided for mediations. In the case of mediation, because there is an important "trust issue", individuals who expect to experience difficulty in participating in English or French, are asked to bring a friend or family member to assist them. The annual cost to the Commission of retaining interpreters is approximately \$45,000.

The Commission's offices are accessible to disabled persons. Signers for the deaf and other assistance is provided as needed.

5. Written Reasons

All arbitrations and appeals that are decided result in an order and written reasons.

6. Publication of Decisions and Reasons

The OIC makes copies of the decisions available and mails them to subscribers on a monthly basis.

Digests of decisions are available through the reporting services of several legal publishers. Full text of the decisions is available through Quicklaw.

F. BUDGET

The total budget of the Dispute Resolution Group for the fiscal year 1994-95 was approximately \$4 million. The major source of funding for the Ontario Insurance Commission is the insurer industry, which pays annual assessments. Other sources include the licence fees paid by agents, adjusters and brokers. There are also filing fees for arbitrations, appeals and reconsiderations, and "assessments" on these activities that apply to insurers.

SECTION 3: WORKERS' COMPENSATION BOARD

A. MANDATE

The Workers' Compensation Board ("WCB") administers a vast and complex accident benefits scheme that provides compensation for workers who, in the course of their employment, are injured or suffer an occupational disease. The dependants of workers suffering work-related deaths are also covered. As of December, 1993, the WCB's total assets and liabilities were \$6.7 billion and \$18.2 billion, respectively.⁵⁷

There are two classes of employers under the *Workers' Compensation Act* ("Act").⁵⁸

Schedule 1 employers pay assessments based on their industry and their employees' earnings. These assessments are used to maintain the Accident Fund, from which the WCB pays claims. Schedule 1 employers are not directly responsible for the compensation and other costs associated with their employees' claims. This system is known as "collective liability". Most Ontario employers are included under Schedule 1.

⁵⁷ Workers' Compensation Board, *1993 Annual Report*, at 23.

⁵⁸ R.S.O. 1900, c. W.11.

Schedule 2 employers do not contribute to the Accident Fund, but are directly responsible for the compensation and other benefits paid to their workers. As a matter of practice, the WCB makes the necessary payments and then collects the funds from the individual employer, together with an administration fee. Schedule 2 employers deposit money with the Board, from which payments may be made. Among Schedule 2 employers are the provincial government, municipal governments and industries that operate interprovincially (for example, railways, airlines, telephone companies).

Some employers, however, are not included in either schedule. Most of them may elect to be covered by Schedule 1.⁵⁹ Pursuant to an agreement with the federal government, workers employed by the federal government and its agencies in Ontario are covered. These employers are treated in almost the same way as Schedule 2 employers.

One of the main precepts of the Act is that, in return for requiring employers to pay for compensation benefits, the restricted common law rights of workers to sue their employers are removed. The statutory rules respecting civil actions are complex.⁶⁰ Workers of Schedule 1 employers cannot sue their own employers or other Schedule 1 employers; however, they may sue employers that are not included in Schedule 1.⁶¹ Workers of Schedule 2 employers cannot sue their own employers, but may bring actions against other employers, including other Schedule 2 employers.⁶² Employers that are not covered by either schedule and their employees are governed by the common law principles governing civil actions by employees against employers, which have been amended by the Act.⁶³

The Act establishes an array of benefits and rights to which a worker may be entitled, depending on the circumstances of the particular claim and the date of the injury. The latter factor is critical because the scheme of benefits has been significantly changed by legislative amendments. The amendments apply only to injuries that occur after the changes have come into effect. The fact that different workers are subject to different rules, depending on the date of injury, contributes to the complexity of the workers' compensation scheme.

Among the benefits and rights that may be available to employees under the Act are the following: temporary wage-loss benefits; a right to re-employment by the employer, subject to certain conditions; medical and physical rehabilitation services; permanent disability benefits for pre-January 2, 1990 claims; vocational rehabilitation services; and, for employees who are injured after January 2, 1990 and suffer permanent impairment, future economic loss benefits (known as "FEL") and non-economic loss awards (known as "NEL"). Each of these rights and benefits involves the application of a complex mix of legislation, WCB policy and decisions of the Workers' Compensation Appeals Tribunal.⁶⁴ For purposes of this study, it bears noting that FEL benefits involve subsequent review of the benefit twice before the

⁵⁹ Dee, McCombe and Newhouse, *Butterworths Workers' Compensation in Ontario Service*, §10.4 (hereinafter referred to as "Dee"). The discussion draws very heavily on this book.

⁶⁰ *Ibid.*, ch. 10.

⁶¹ To bring an action, a worker must make an election under the Act. A worker who elects to maintain a civil action cannot claim workers' compensation benefits. See discussion in Dee, *supra*, note 3, §10.49-10.61.

⁶² The worker must make an election: see discussion *ibid.*

⁶³ *Workers' Compensation Act*, *supra*, note 57, ss. 140-42.

⁶⁴ Indeed, Dee, *supra*, note 59, devotes a chapter to each of them.

recipient turns 65. After the amount of the FEL benefit is established initially, it is reviewed two years later and again three years thereafter.

In 1993, the Board had expenses of \$3.308 billion. Benefit payments constituted approximately 87% (\$2.865 billion).⁶⁵ The largest component of benefits was payment for long-term disability.

The WCB does not receive any of its funds from the government. Its revenues are derived from the assessments paid by Schedule 1 employers and reimbursements made by Schedule 2 employers, and from investments. In 1993, for example, the Board received revenues totalling \$2.804 billion; \$2.28 billion were from employers, and \$521 million were earned from investments. Assessments of Schedule 1 employers constituted about 72% of the revenue.

The WCB has been gradually introducing an experience rating program, New Experimental Experience Rating (or "NEER"), under which employers may have their payments raised or lowered each year according to their accident experience. An employer's experience is compared to that of employers in the same industry or group. Allowable claims affect the experience rating of an employer.

The WCB has 6 regional offices, which are located in major urban centres, and 6 area offices, which are located in other urban centres.

B. PROCESS AND PROCEDURE

This section will outline the claims and the *internal* appeals process. To understand them, it is necessary to comment briefly about the administrative structure of the WCB.

Before doing so, however, it is important to observe that the WCB is a mass adjudication system in which the overwhelming majority of decisions are made "administratively". Each year hundreds of thousands of decisions are made without oral representations, hearings, motions or representatives. Initial decisions are made on the basis of documents, often supplemented by telephone calls and, exceptionally, by the WCB's investigations. Relatively few cases proceed to more formal levels of process. This approach is dictated by the enormous volume of cases and the need to make decisions as quickly and inexpensively as possible.

While the initial level of decision-making lacks the indicia of procedural "fairness", workers and employers have an opportunity to object to the decision and to pursue it in a hearing in which the issue is considered on a *de novo* basis.

1. Administrative Structure

The WCB is composed of seven divisions, three of which are relevant to this paper: (1) Client Services Division; (2) Finance and Administration Division; and (3) Human Resources and Client Appeals Division.

The Client Services Division makes most kinds of decisions concerning entitlement to benefits, including determinations on ongoing entitlement. Within the Division, certain kinds of claims decisions are handled on a centralized basis by specialized Integrated Service Units ("ISUs"), the Complex Case Unit - Diseases and the Complex Case Unit - Injuries. Both are located in Toronto. The former's mandate is occupational diseases. The latter's mandate includes FEL benefits, NEL benefits and workers with extremely serious disabilities.

⁶⁵ Workers' Compensation Board, *1993 Annual Report*, at 25.

Matters that are not addressed on a centralized basis are handled by the Division's general ISUs and by regional offices ("RO"). The ISUs are located in Toronto. There is also a separate Construction ISU, which is also in Toronto.

The Finance and Administration Division is comprised of the Revenue Department, Administration Department and the Finance Department. Among the matters for which the Revenue Department is responsible are registration and assessment of employers. The Administration Department is responsible for registering claims and primary adjudication in simple cases.

The Human Resources and Client Appeals Division deals with claims appeals from decisions of the Client Services Division and assessment appeals from decisions of the Revenue Department. There are two appeal routes. Generally, appeals are determined by the Decision Review Branch and may be further appealed to the Hearings and Re-employment Branch.

2. Claims

(a) Submitting Claims

Claims are initiated by the Employer's Report of Accident (Form 7), the Worker's Report of Accident (Form 6), or Physician's First Report (Form 8). The Identification and Registration Section of the Records Management Services Branch registers the claims.

(b) Claims Decisions

Claims initiated by Form 7 are sent to the Primary Adjudication Section. A primary adjudicator will decide the claim on the basis of Form 7 alone if he or she is able to do so. Otherwise, the matter will be sent to an ISU or RO. Claims that are not initiated by a Form 7 are sent to an ISU. Working with the ISU's entitlement team, an entitlement adjudicator will decide whether the claimant is entitled to benefits.

After entitlement is established, the size and duration of the claimant's benefits are determined. What body makes the decision depends on the type of benefit.

Most benefits are decided by benefits adjudicators who work within benefit teams in the ISU or RO. Adjudicators may seek the assistance of medical advisors and rehabilitation case-workers.

Determinations involving payment of FEL benefits and NEL benefits are made within the Complex Cases Unit - Injuries.

Formerly, complaints about re-employment were transferred from adjudicators to the Hearings and Re-employment Branch for initial decision. For injuries occurring or after January 1, 1995, an initial decision on the employer's re-employment obligation is by an adjudicator within the ISU or RO.

3. Review and Appeal

(a) Worker and Employer Appeals

Most worker and employer appeals follow the procedure outlined in this section. Employer assessment appeals are subject to a different process, as are re-employment and vocational rehabilitation appeals. Both processes are outlined below.

A worker or an employer who is notified of a decision may file an objection with the WCB.⁶⁶ It is then reviewed by the adjudicator who made the original decision. If he or she does not change the original decision, the ISU or RO refers the claim to the Decision Review Branch, which is located in the head office in Toronto. A decision review specialist will review the decision. A worker or employer may appeal that decision to the Hearings and Re-employment Branch, in which a case a hearings officer holds a hearing. In most cases, the worker or employee initiates the process by writing the Hearings and Re-employment Branch.

The Hearings and Re-employment Branch provides mediation services in relation to objections concerning employment benefits, return to work and certain other issues. Mediation is not available in relation to objections to entitlement decisions and cases for which additional medical information is necessary.

Employers and workers may appeal decisions made by the Hearings and Re-employment Branch to the Workers' Compensation Appeal Tribunal.

(b) Employer Assessment Appeals

Certain kinds of decisions made by the Revenue Branch may be appealed by employers.⁶⁷ Their objections are first considered by the Employer's Assessment Committee, which includes the Director of the Revenue Branch. If the Committee confirms the original decision, the case is referred to the Decision Review Branch. If the Decision Review Branch confirms the initial decision, an employer may seek a hearing by the Hearings and Re-employment Branch, in which case a hearing will be conducted by a hearing officer.

The Hearings and Re-employment Branch provides mediation services in relation to issues raised by these appeals.

Employers, in addition, may apply to the Hearings and Re-employment Branch for a reconsideration.

Further appeals are to the Workers' Compensation Appeal Tribunal.

(c) Re-employment and Vocational Rehabilitation Appeals

In the case of objections relating to re-employment and vocational rehabilitation rights and obligations, as in the case of most appeals, the original adjudicator first considers the matter. If he or she confirms the decision, the matter is forwarded to the Hearings and Re-employment Branch without passing through the Decision Review Branch.

When these rights were created in 1990, the Branch initiated mediation measures. The amendments to the *Workers' Compensation Act* that came into effect on April 3, 1995 required the WCB to offer mediation services in connection with objections relating to re-employment and vocational rehabilitation.⁶⁸

⁶⁶ One reason an employer may appeal is because the claim will affect his experience rating, and may ultimately result in a higher payment.

⁶⁷ For a discussion, see Dee, *supra*, note 59, §§2.151-22.153.

⁶⁸ *Workers' Compensation Act*, *supra*, note 58, s. 72(1), as enacted by S.O. 1994, c. 24, s.s. 22.

4. Procedure

The *Statutory Powers Procedure Act* does not apply to proceedings and decisions of the WCB.⁶⁹ The *Workers' Compensation Act* provides that "[a]ny decisions of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing".⁷⁰ Procedures are regulated by the Act and the WCB Operational Policy Manual. While the WCB has the authority to make rules governing its practice and procedure, it has not done so.

Reviews by adjudicators and decision review specialists are "paper reviews", and do not involve any oral submissions.

Hearings before hearing officers afford parties an opportunity to make oral representations. Hearings are conducted at the Toronto office or regional offices. In some cases, "hearings" are conducted entirely on the basis of written submissions.

At oral hearings, parties may bring witnesses or submit documentary evidence. WCB employees, however, cannot be compelled as witnesses.

At the hearing, the hearing officer has a copy of the WCB claim file. He or she may question witnesses. If necessary, the hearing officer may adjourn the hearing to make further inquiries.

Prior to the 1995 amendments respecting mediation, the Hearings and Re-employment Branch had offered mediation services on a voluntary basis in connection with certain objections relating to re-employment and vocational rehabilitation. The 1995 amendments require the WCB to offer mediation services for all re-employment and vocational rehabilitation issues. They also specifically empower the WCB to offer mediation services for other matters.⁷¹

There is a time limit for disposing of a matter that has been sent to mediation. The amendments provide that "[u]nless the mediation is successful, the Board shall finally determine the matter within 60 days after the Board receives the objection or application or within such longer period as the Board may permit".⁷²

Mediation is provided by Board employees. However, the Act forbids a person providing mediation services from participating in any application or proceeding concerning the matter that is the subject of the mediation, unless the parties consent.⁷³

Except in the case of complex issues, mediations are conducted from the head office by telephone and teleconference. Complex issues may involve in-person meetings with a mediator.

C. CASELOAD

The WCB's *Monthly Monitor* appears to be the best public source of statistical information about caseload and the length of time required to "process" claims through the system.

⁶⁹ *Ibid.*, s. 73(2).

⁷⁰ *Ibid.*, s. 73(1).

⁷¹ *Ibid.*, s. 72.1(2), as enacted by S.O. 1994, c. 24, s. 22.

⁷² *Ibid.*, ss. 72.1(3), as enacted by S.O. 1994, c. 24, s. 22.

⁷³ *Ibid.*, s. 72.1(4), as enacted by S.O. 1994, c. 24, s. 22.

Throughout this paper, reference will be made to the *Monthly Monitor* of January, 1995, which presents data for the calendar year 1994 and, for certain matters, preceding years.

The Board's Annual Report summarizes its activities for the past fiscal year and presents a financial report. The latter includes audited financial statements and a detailed discussion of the Board's financial position.

The Board also publishes a statistical supplement to each annual report. The supplement presents data about the number of registrations and accidents and detailed information about the types of claims and certain benefits.

1. Claims

The January 1995 *Monthly Monitor* presents data on the number of new claims and the number of re-opened claims.⁷⁴ Both factors have to be taken into account in assessing the WCB's caseload. However, the total of new and re-opened claims by itself would not constitute the full caseload. Certain types of claim only involve an initial decision as to whether the injury occurred as reported. Other claims require further adjudicative decisions after initial entitlement has been established, which are not reflected in the reported data on new and re-opened claims. For example, a permanent injury will include decisions on an initial allowance, the duration and magnitude of temporary benefits, the operation of re-employment obligations, medical rehabilitation, vocational rehabilitation, NEL benefits, FEL benefits, and two reviews of FEL benefits. Any of these decisions may lead to an objection by a worker or an employer.

Most claims are reported and registered in the year in which the accident occurred. Some, however, are reported and registered in a subsequent year. The chart below shows the breakdown of claims for each year by claims registered in the current year and claims registered in the previous year.

	Registration Year				
	1990	1991	1992	1993	1994
Total Registered	479,731	418,591	382,426	373,050	374,246
Accidents in Current Year	439,724	397,729	366,001	355,250	359,638
Accidents in Previous Year	40,007	20,862	16,425	17,800	14,608

The chart below shows the number of claims that were re-opened in each of the years 1991-1994, and their status at the end of 1994.

Status	Re-opened Year			
	1991	1992	1993	1994
Total	33,389	30,359	29,844	27,670
Allowed	18,534	15,721	15,089	12,617
Not Allowed	10,358	10,728	11,866	9,754
Pending	0	0	0	2,910
Deleted	4,497	3,910	2,889	2,389

⁷⁴

The notes to the *Monthly Monitor* advise that "re-opening of a claim is largely due to the recurrence of a disability after returning to work".

2. Decision Review

The January, 1995 *Monthly Monitor* indicates the number of decisions that were rendered at decision review and their outcomes for the years 1991-1994. It records data on the basis of issues, rather than claims. If a claim involves two issues that were reviewed, it would be recorded as two decisions.

In 1991, 13,680 decisions were rendered; in 1992, 15,456 decisions were rendered; in 1993, 27,103 decisions were rendered; in 1994, 24,515 decisions were rendered.

Appeals that were granted ranged from 17-21% of the decisions. Appeals that were granted in part were 3% of the decisions in three of the four years; in the other year, it was 4%.

Appeals that were denied were 71% of the decisions in two of the years; in the other years they constituted 76% and 78% of the decisions. The balance comprised matters that were withdrawn.

3. Hearings

The January 1995 *Monthly Monitor* presents information about the number of applications, hearings, and decisions for the years 1990-94. It bears noting that certain objections may be appealed to the hearing stage without first having to go through decision review. Accordingly, the potential "field" of decisions that may be appealed to the Hearings and Re-employment Branch is larger than the number of appeals that are denied at decision review.

The chart below summarizes the basic data on hearings. (Information is recorded on the basis of claims.)

	1990	1991	1992	1993	1994
Applications Received	4636	6185	5957	11027	14115
Applications Accepted	not available	4951	4623	9219	11066
Hearings Held	3549	3747	4572	4724	7666
Decisions Rendered	2928	3021	3573	3436	5159

The *Monthly Monitor* also presents data on "outcomes" (number of appeals granted; number denied and withdrawn). The rate of appeals that were granted, in whole or in part, ranged from 52% to 61%.

D. LENGTH OF THE PROCESS

1. Claims

The WCB has established "performance expectations" for claims decisions. The time periods that are measured vary with the type of claim as follows:

Type of Claim	Time Period
Claims that do not result in any payment to the worker (where no wage loss benefits are paid to the worker or the claim is denied)	From registration date to initial entitlement decision
Allowed claims that involve payments to worker for wage loss	From registration date to first compensation payment
Re-opened Claims	From re-opening date to re-open decision date

The performance expectations for disposing of the claim vary with the type of claim. For decisions in initial and re-opened entitlement decisions for all claims, except for complex cases and claims by federal employees, the standard is as follows:

- 80% of claims should receive decisions or first compensation payment within 4 weeks;
- 95% of claims should receive decisions or first compensation payment within 8 weeks;
- 100% of claims should receive decisions or first compensation payment within 8 weeks.

For complex cases (for example, occupational diseases) and claims by federal employees, the standard is as follows:

- 50% of claims should receive decisions or first compensation payment within 4 weeks;
- 75% of claims should receive decisions or first compensation payment within 8 weeks;
- 90% of claims should receive decisions or first compensation payment within 16 weeks;
- 100% of claims should receive decisions or first compensation payment within 24 weeks.

The January 1995 *Monthly Monitor* indicates the extent to which the performance expectations were met for claims that were registered from December, 1993 to November, 1994. It reveals that the Board was least successful in meeting the standards for complex claims.

The timeliness of the initial decision and appeals is an important measure of the timeliness of the WCB system as a whole. Other important indicators include the timeliness of NEL and FEL decisions.⁷⁵

2. Decision Review

Once a claim is sent to the Decision Review Branch for review, it takes about 15-20 weeks for a decision to be rendered by the decision review specialist.

3. Hearings

Where the "hearing" consists of a consideration of written submissions, rather than an oral hearing, it has taken 2 or 3 months to render a decision from the date of application for the hearing.

Where oral hearings are held, it takes approximately 3.5-4 months to set the date, after which it takes about 9 months for a hearing to convene. The hearings themselves may range from less than a hour to several days.

E. ACCESS ISSUES

1. Representation

The vast majority of workers and employers are not represented at the initial level of decision-making.

Workers are represented by unions, legal clinics, private consultants, and lawyers. Employers are represented by private consultants, lawyers, and in-house health and safety/compensation representatives.

⁷⁵ Data on these issues are published in the *Monthly Monitor*.

The Ministry of Labour's Office of the Employer Advisor and Office of the Worker Advisor provide assistance to employers and workers, respectively, in making appeals at no cost to the individual worker or employer.

There has been an increase in the extent to which workers and employers have been represented in dealing with the WCB, even at the initial stage of the process.

2. Fees, Expenses And Costs

The WCB has no jurisdiction to order a party to pay costs or to impose fees on persons who wish to object to decisions or appeal.

The WCB pays travel expenses for parties to travel to a hearing that is held in a location different from that where they reside. It also pays reasonable expenses for necessary witnesses, for which prior authorization has been given by the hearings officer or the Hearings and Re-employment Branch.

3. Geographical Accessibility

Initial claims decisions are made in ISUs and ROs. Decision review takes place in the head office in Toronto.

Hearings by the Hearings and Re-employment Branch are held in Toronto or in a city in which a regional office is located.

4. Language/Accommodation

Hearings may be conducted in English or French. Interpreters are provided for other languages.

5. Written Reasons

Written reasons are given for decisions on claims and assessments, decision reviews and hearings.

6. Publication of Decisions and Reasons

The WCB does not publish its decisions. Hearing decisions in re-employment and vocational rehabilitation appeals are available in the WCB and WCAT libraries.

SECTION 4: WORKERS' COMPENSATION APPEALS TRIBUNAL

A. MANDATE

The Workers' Compensation Appeals Tribunal ("WCAT") hears appeals from final decisions of the Workers' Compensation Board ("WCB").⁷⁶ It also has originating jurisdiction to "hear, determine and dispose of...(a) any matter or issue expressly conferred upon it by [the *Workers' Compensation Act*]" ("Act").⁷⁷ Among the issues given to WCAT is the

⁷⁶ WCAT's jurisdiction is set out in s. 86 of the *Workers' Compensation Act*, *supra*, note 58.

⁷⁷ *Ibid.*, s. 86(1)(a).

determination whether a person's right to bring a civil action has been removed or limited by the Act.⁷⁸

It bears emphasizing that WCAT differs from most other Ontario administrative tribunals: while it does adjudicate, it does so from the point of view of investigating statutory rights and benefits. Its process is inquisitorial rather than adversarial in nature; WCAT does not adjudicate disputes between parties. Much of its resources, therefore, are dedicated to pre-hearing inquiries and post-hearing investigations.

B. PROCESS AND PROCEDURE

1. Outline

WCAT's *Annual Report 1992 and 1993* ("1992/1993 Annual Report")⁷⁹ describes the appeal process. This summary will highlight its main features.

Upon receiving an application for an appeal, the Intake Office obtains the workers' file from the WCB and other preliminary information. It forwards the file to the Tribunal Counsel Office ("TCO"), which prepares the case for hearing by compiling a "Case Description" ("CD"). The CD set out copies of the relevant WCB documents, and may identify the issues and summarize the facts. The CD is sent to the employee and employer, or their representatives. It is sent to the Scheduling Department, which sets a hearing date.

The CD is also sent to WCAT's Medical Liaison Office ("MLO"), which identifies medical issues and reviews the medical evidence in the file. It may also consult with WCAT's Medical Counsellors about "significant omissions or deficiencies".⁸⁰ The MLO may further investigate medical issues before the hearing date or make proposals to the hearing panel about appropriate medical investigation. If medical investigation is not completed by the date of the hearing, the hearing panel may direct further investigations after the hearing.

A WCAT counsel may be assigned to assist with the appeal. Counsel researches the relevant law and may help to clarify the issues that are likely to be considered at the hearing.

Three weeks before the hearing, all evidence (including the CD) must be filed with WCAT and given to the parties.

2. The Hearing

The *Statutory Powers Procedure Act* does not apply to WCAT. The Act permits WCAT to control its own process and to make procedural rules by regulation. It has yet to develop formal procedural rules. WCAT has issued several Practice Directions.

Hearings are held by a tripartite tribunal for all issues, except for one: under the Act, before the hearing, after an investigation, a single Vice-Chair may order a worker to attend for a new medical examination.

⁷⁸ *Ibid.*, s. 17.

⁷⁹ Workers' Compensation Appeals Tribunal, *Annual Report 1992 and 1993* (1994) (hereinafter "1992/93 Annual Report").

⁸⁰ *Ibid.*, at 23.

In addition to the parties, a WCAT counsel from the TCO may participate in the process. In order “to ensure that there is an adequate record before the panel”,⁸¹ a panel may ask the counsel to attend to cross-examine witnesses or to present evidence. The latter usually involves evidence from a WCAT medical assessor. A panel may also ask counsel to make submissions on the law, either by attending at the hearing or by presenting them in written form.

Witnesses may be questioned by members of the hearing panel, as well as by the parties.

If a hearing panel concludes that the case requires further medical or other investigations, whether during the hearing or, subsequently, while it is in the process of making a decision, it may direct the TCO to co-ordinate the investigation after the oral hearing has ended.

Hearings are usually conducted as formal oral proceedings with the parties and their representatives in attendance before a tripartite panel. Entitlement-related appeals, and the medical examination and right to sue issues almost always involve formal oral hearings. “Hearings” on leave to appeal, access and reconsideration issues usually take the form of the panel reviewing the parties’ written submissions.

It bears emphasizing that a single WCAT appeal may involve more than one oral hearing, and the hearings may be spread several months apart. Hearings may be separated by, or followed by, one or more sessions of posthearing investigation. While most hearings are conducted in a one-day sitting, multiple-day sittings also occur.

3. Pre-Hearing Procedures

WCAT requires pre-hearing disclosure of evidence that will be presented at the hearing, including documents and witness “will say” statements.

WCAT also uses pre-hearing conferences for a variety of purposes.⁸²

4. Alternative Dispute Resolution

Under the Act, substantive issues cannot be settled, for the Act prohibits the workers from waiving any of their rights. Accordingly, the field for mediation is relatively narrow. WCAT has adopted mediation measures for cases arising from worker opposition to employer-sponsored medical examinations and employer access to worker medical reports and for settling the issues agenda for the appeal.

It bears noting that many disputes before WCAT involve a worker’s objection to a decision concerning his or her rights in relation to the WCB’s Accident Fund, and the employer is often not present. Nor is the Fund a party. Even when the employer is present, the Accident Fund’s interests are not always represented. Accordingly, it is not uncommon for a panel to be dealing with unrepresented interests in its hearings and decision-making.

⁸¹ *Ibid.*, at 25.

⁸² Prehearing conferences may be used for the following reasons: to narrow or define the issues to be determined; to define the “issues agenda” for the hearing; to determine what evidence may be required or whether further investigations should be undertaken. Sometimes the first hearing becomes a prehearing conference if it becomes apparent to the panel that any of the usual reasons for prehearing conferences apply. This is more likely to be the case where the appellant is unrepresented.

C. CASELOAD

1. Incoming Cases

Since 1990, the number of new cases has increased each year. There were 1519 appeals in 1990, 1560 in 1991, 1804 in 1992, 2151 in 1993, and 2197 in 1994. Using 1990 as a base, the next four years saw the following increases over that level: 3% (1991); 19% (1992); 42% (1993); 45% (1994). This has been a significant development, as WCAT had experienced an influx of 1500-1600 new appeals per year from 1988 to the end of 1991.

For the years 1990-94, appeals by workers or their representatives constituted 80% or more of the appeals to WCAT and, in 3 of those years, they composed approximately 86% of the new appeals. The balance was brought by employers or their representatives.

In the 1992/93 Annual Report, the Tribunal Chair discussed the then developing caseload problem, and suggested reasons that the trend might continue. Among them were the following: (1) increased number of decisions being made by the WCB; (2) increased advocacy resources available to injured workers; and (3) appeal cases becoming more complex.⁸³

The number of WCB decisions, at both the Decision Review Branch and the Hearings and Re-employment Branch, has continued to increase significantly.

To a certain extent, the increase in number of WCB adjudications and in complexity of WCAT appeals can be attributed to the structural changes introduced by the *Workers' Compensation Amendment Act, 1989*.⁸⁴

2. Number of Dispositions

The 1992/1993 Annual Report shows the number of cases closed⁸⁵ for each year for the years 1990-1993. It also presents a detailed breakdown of cases by appeal type.

The number of cases closed by year was as follows: 1593 (1990); 1776 (1991); 1664 (1992); 1864 (1993).

In 1994, 1,783 cases were closed, of which 908 were closed without a hearing. Cases may close without a hearing for various reasons: they may be abandoned or withdrawn, or WCAT may not have jurisdiction to deal with them.

In 1994, of the 875 cases disposed after hearings, 856 were dealt with by final decisions.

3. "Backlog"/Remaining Inventory of Cases

The 1992/1993 Annual Report shows that the inventory of remaining cases declined each year from 1986 to 1991, and then rose each year through to 1993.⁸⁶

⁸³ 1992/93 Annual Report, *supra*, note 79, at 1-4.

⁸⁴ S.O. 1989, c. 97. In the 1992/93 Annual Report, *supra*, note, at 79, the Chair, Mr. Ellis, stated that "[t]he increased complexity shows up in the ...data as increases in the average number of hearings required to dispose of a case, increased numbers of days for particular hearings, a higher percentage of cases requiring post-hearing procedures, and longer decision-making processes on average".

⁸⁵ "Closed" means that the file can be closed administratively. It usually takes a few days of clerical work to close a file after an appeal has been decided. The "decision date" is the date the decision is released.

⁸⁶ 1992/93 Annual Report, *supra*, note 79, Fig. 8, at 39.

4. Number of Cases Heard vs. Number of Hearings

Because a single appeal may involve more than one hearing, the number of hearings may exceed the number of "cases" in a year. For example, in 1994, 1,155 cases received initial hearings, but WCAT held 1,419 hearings in that year.

The table below shows the number of cases heard for the years 1990-1994, based on the year in which the first hearing in the appeal was conducted.

1990	1991	1992	1993	1994
1096	1032	984	967	1155

The table below shows the number of hearings during the years 1990-1994. These hearings include hearings that led to final decisions, hearings that led to interim decisions, and hearings that did not culminate in any decision on the merits of any appeal.

1990	1991	1992	1993	1994
1149	1151	1232	1245	1419

In 1994, 88% hearings were formal oral hearings, while the balance of the hearings involved a panel reviewing written submissions (8%) and other means (4%). In 1993, about 82% were formal oral hearings, while 20% involved a review of written submissions (12%) and other means (8%).

5. Number of Decisions

WCAT issues interim and final decisions. Interim decisions do not dispose of the case and anticipate a further decision. Examples include decisions that define the issues for hearing, decisions that define what medical evidence is needed, and procedural rulings, including decisions on adjournment requests.

The table below presents data on the number of final decisions given in each of the years 1990-1994. It shows the number of cases that were the subject of a final decision.

1990	1991	1992	1993	1994
1008	940	957	773	856

The table below presents data on the number of decisions given in each of the years 1990-1994. It covers both interim and final decisions.

1990	1991	1992	1993	1994
1082	1064	1074	907	1032

6. Measures to Address an Increasing Caseload⁸⁷

The 1992/93 Annual Report outlines several measures that WCAT initiated to deal with its increasing caseload in a time of fiscal restraint. WCAT changed its practice from negotiating

⁸⁷ The discussion below is based on 1992/93 Annual Report, *supra*, note 79, at 5-7.

hearing dates with parties to choosing a date unilaterally, leaving it to the parties to advise the Scheduling Department if it is not convenient.

WCAT staff began to suggest to parties and their representatives that they should withdraw their cases when they are not ready for hearing; premature cases that are scheduled for hearing have to be adjourned, which involves waste or duplication of WCAT resources. Special care is taken in cases where parties are not represented.

WCAT introduced telephone pre-hearing conferences for out-of-Toronto hearings to settle the issues agenda for the hearing and evidence questions. This would better ensure that the parties are prepared to proceed on the hearing date.

D. LENGTH OF THE PROCESS

The table below presents the median overall processing times (from date of application to case closing) by appeal category and generally for cases that closed in each of the years 1992, 1993, and 1994. There are significant variations according to the type of the appeal. Medical exam and access appeals typically take much less time to process than right to sue issues and leave and entitlement issues.

MEDIAN PROCESSING TIME IN CALENDER DAYS

APPEAL TYPE	CLOSED IN 1992	CLOSED IN 1993	CLOSED IN 1994
Medical Exam and Access	94	48	47
Right to Sue	236	293	325
Entitlement-related	264	273	306
Post-decision issues ⁸⁸	204	189	216
All cases combined	201	170	207

The table below shows the median time in calender days between receipt of application (initial notice of intent to appeal) and the first hearing date for cases that had their first hearing in 1994. The median time for all cases was 235 days. However, the table shows significant variations by category of appeal. Leave and entitlement issues required considerably longer pre-hearing intervals than medical exam and access cases and, in particular, post-decision cases.

APPEAL TYPE	Date of Application to First Hearing Date
Medical Exam and Access	120
Right to Sue	174
Entitlement-related	247
Post-decision issues	21
All cases combined	235

Since not all cases are ready for decision-writing after the first hearing, the most appropriate measure of the time it takes to issue a decision after hearing is from the date of the

⁸⁸ Post-hearing issues involve reconsiderations, applications, Ombudsman complaints and judicial review applications.

last hearing. It has already been noted that many cases require additional hearings, and many involve post-hearing investigations, evidence and submissions.

The table below shows the median time in calender days from the last hearing date to the release of the final decision for cases closed in 1994. It not only includes the time needed to write the decision, but the time needed for further investigations. This table does not reflect that the decision-writing component is about 2/3 of the time.

APPEAL TYPE	Last Hearing Date to Date of Release of Final Decision
Medical Exam and Access	29
Right to Sue	104
Entitlement-related	83
Post-decision issues	58
All cases combined	74

As the table shows, the median time from the last hearing to release of the final decision was 74 days for all cases. There were variations according to the appeal type. For medical exam and access cases, the median was 29 days; for right to sue cases, the median was 104 days.

A single appeal may involve more than one hearing, as the matter may be adjourned at the request of one of the parties or require further investigations. In 1994, only 56% of appeals were completed after the first hearing; the balance required further hearings and/or post-hearing investigations.

In 1994, 97% of the hearings involved one sitting day; 2% were given two days; 1% took 3 or more days. The maximum number of sitting days for any 1994 hearing was 5.

In cases that were not completed after the first hearing, typically there was period of 225 days between the first day of hearing and the date on which the decision was ready to be made.⁸⁹ For medical exam and access cases, the median was 110 days; for leave and entitlement-related cases, the median was 239 days.

E. ACCESS ISSUES

1. Representation

Workers and employers usually have some form of representation at WCAT hearings. The charts below summarize the type of representation for each. (The database records "no representation" where the type of representation was not recorded).

⁸⁹ WCAT refers to this as "the date of decision readiness". On that date, the hearing and any subsequent investigations have been completed, and the Vice Chair is ready to begin preparing the decision. His or her draft decision is circulated to the other panel members for their consideration. In the course of this process, the decision and reasons are often altered as a result of the input of the other panel members.

EMPLOYER REPRESENTATION*

Company Personnel	Consultant	Lawyer	Other	Office of Employer Advisor	No Representation
19%	20%	35%	8%	11%	7%

*Where the employers participate

WORKER REPRESENTATION

Consultant	Lawyer or legal aid/asst.	Office of Worker Advisor	Union	Other	No Representation
7%	13%	29%	18%	18%	17%

There are regional variations in the patterns of representation.⁹⁰

The services of the Office of Worker Advisor and the Office of Employer Advisor are available at no cost to employees and employers, respectively.

2. Fees, Expenses and Costs

WCAT has no authority to impose fees on appellants. Nor does it have jurisdiction to order a party to pay another party's costs or to order a party to pay its expenses associated with a hearing.

3. Geographical Accessibility

WCAT's offices and hearing facilities are located in one building in Toronto. Hearing panels regularly travel to major centres throughout Ontario.

4. Language/Accommodation

French language hearings are provided by bilingual hearing panels.

WCAT's premises and the hotels that it uses for its out-of-Toronto hearings are wheelchair accessible. Signers are provided for deaf parties and witnesses.

5. Written Reasons

Written reasons are given with every decision.

6. Publication of Decisions and Reasons

Copies of decisions are available in WCAT's library and through a commercial electronic database. WCAT publishes the "WCAT Reporter", which collects selected significant cases.

⁹⁰ 1992/93 Annual Report, *supra*, note 79, at 35 and 42 (Figure 13).

F. COST OF WCAT

WCAT's operating expenditures for 1994 were as follows (\$000s):

Salaries and Wages	6,461
Employee Benefits	1,086
Transportation and Communications	396
Services	2,796
Supplies and Equipment	252
TOTAL	10,991

Its other expenditures in 1994 were capital expenditures of \$39,600 and its Social Contract commitment of \$327,70. The expenditures for that year were approximately \$11,358,300.

The cost involved in WCAT members travelling to out-of-Toronto hearings was approximately \$229,000. The travel costs for workers and their witnesses was approximately \$57,000. The cost of rental hearing rooms for out-of-Toronto hearings was approximately \$40,000.

The cost of retaining outside counsel and experts (who are generally medical experts) was approximately \$256,000.

Approximately \$1 million of the "services" expenditure was rental of office space.

Expenditures for 1992 and 1993 were comparable.

WCAT is funded by the Workers' Compensation Board. The WCB does not receive any of its funds from the government. Its revenues are derived from the assessments paid by Schedule 1 employers and reimbursements made by Schedule 2 employers, and from investments.

SECTION 5: DECISIONS UNDER THE *EMPLOYMENT STANDARDS ACT*

A. MANDATE

The Employment Practices Branch and the Employment Standards Program of the Ministry of Labour are responsible for the administration and enforcement of the *Employment Standards Act* ("Act").⁹¹ The Employment Practices Branch is the main or head office; it is the office of the Director of Employment Standards. The Employment Standards Program is the field operation, dispersed among six area offices.

The Act establishes minimum standards in the workplace. Among the matters addressed by the Act are the following: minimum wages; hours of work and overtime pay; public holidays; paid vacations; equal pay for equal work; pregnancy and parental leave; termination of employment, including termination and severance pay and lay offs. In 1991, the Employee Wage Protection Program was established, giving employees a right to compensation in certain circumstances.⁹²

The Act gives the Director of Employment Standards and employment standards officers ("ESOs") authority to exercise certain powers and make certain decisions. The Director may authorize an ESO to exercise any of his or her powers.

⁹¹ R.S.O. 1990, c. E.14. Significant amendments have been made to the Act during the past 5 years.

⁹² *Ibid.*, Part XIV.1, as enacted by S.O. 1991, Vol. 2, c. 16, s. 5.

Where an employer has not complied with certain provisions of the Act, ESOs have power to order the employer to make payments in favour of employees.⁹³ Where an ESO has determined that an employee is entitled to wages from an employer, he or she may arrange with the employer to pay the employee directly or receive the wages on behalf of the employee.⁹⁴ While ESOs have power to make orders other than orders requiring payment, most are for payment of wages.

The Act does not suspend or affect “any civil remedy of an employee”. An employee who brings a civil proceeding against his or employer under the Act must give the Director of Employment Standards notice of the proceeding when it is set down for trial.⁹⁵ The Act gives a subrogation right to the Program Administrator, the official responsible for the Employee Wage Protection Program, who is entitled to bring an action against an employer or any other person liable for payment of wages.⁹⁶

B. PROCESS AND PROCEDURE

Each case is assigned to an ESO. Under the Act, ESOs have investigative powers. They include powers to enter premises, except in relation to dwellings, and to compel production of documents.⁹⁷

In exercising their powers to make orders under the Act, ESOs are not subject to the *Statutory Powers Procedure Act*.⁹⁸ However, the courts have held that ESOs are bound by the common law “duty of fairness”: it requires them to inform each party of the case against him and allow an opportunity to meet the other party’s case.⁹⁹

The Operations Division of the Ministry of Labour has established a “Mediator/Advisor Program”, which offers mediation services to employers and employees once an appeal has been requested. Participation in this process is entirely voluntarily. Mediation does not postpone the date of the hearing by the adjudicator or referee: if the matter remains unresolved by that date, the hearing will proceed. If, however, the parties manage to reach an agreement, the mediator will assist in the preparation of Minutes of Settlement. The Minutes of Settlement typically include a withdrawal of the request for a formal hearing under section 67 or 68 of the Act.

Bill 175 amended the Act to give ESOs the power to require a complainant and an employer to meet with the ESO upon giving 15 days written notice. A person receiving such a notice is required to comply with it.¹⁰⁰

⁹³ See, for example, *Employment Standards Act*, *supra*, note 91, ss. 45, 48, 51.

⁹⁴ *Ibid.*, s. 65(1). “Wages” is defined broadly and includes “any payment to be made by an employer to an employee under this Act”: *ibid.*, s. 1.

⁹⁵ *Ibid.*, s. 6.

⁹⁶ *Ibid.*, s. 58.14, as enacted by S.O. 1991, Vol. 2, c. 16, s. 5.

⁹⁷ *Ibid.*, s. 63.

⁹⁸ *Ibid.*, s. 2(3), as am by S.O. 1991, c. 16, s. 1(1) and S.O. 1994, c. 27, s. 57(1).

⁹⁹ *Re Downing and Graydon* (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 55 (C.A.)

¹⁰⁰ *Statute Law Amendment Act (Government and Management Services)*, 1994, S.O. 1994, c. 27, s. 119, enacted s. 64.2 of the ESA.

C. CASELOAD

The chart below presents data showing yearly averages for the fiscal years 1993-94 and 1994-95.

#Employee Claims Alleging Violations	#Decisions/ #Cases Completed	#Orders to Pay	#No Order Given - No violation	#No order - Employer Violation - Employer Paid Voluntarily
18, 811	13,668	2685	4225	6758

The number of decisions is the sum of the number of (1) orders given to employers to pay; (2) decisions to issue no order because the employer has been found not to have violated the legislation; and (3) situations in which the officer has found that the employer has violated the legislation, but where the employer has paid voluntarily, obviating the need for an order.

The Employment Practices Branch received an average of 682 appeals for the fiscal years 1993-94 and 1994-95. Approximately 56% of the appeals settled without a hearing by a referee or adjudicator.

The Ministry of Labour's Annual Reports for the fiscal years 1991-92 and 1992-93 present the following information:

Year	#Cases Completed	Total Amount Collected From Employers	#Employees Who Benefitted Financially	#Inquiries Handled
1991-92	14,059	\$21.4 million	25,711	992,464
1992-93	19,498	\$20.6 million	23,013	975,857

A 1995 Ontario Law Reform Commission report advises that, with respect to wages owed:

- in 1991-92, 8,774 employers were assessed for \$82.6 million, and,
- in 1992-93, 12,500 employers were assessed for \$116.8 million.¹⁰¹

D. LENGTH OF THE PROCESS

On average, it takes 137 days from the receipt of the employee's claim that there has been a violation to the file to the closing of the file by the officer.

The average file takes 75 days to be assigned to the officer; accordingly, the average file is with the officer for 62 days.

E. ACCESS ISSUES

1. Fees, Expenses and Costs

No fees are charged to employees who request the Ministry of Labour to investigate alleged violations of the legislation. However, where an officer orders an employer to pay wages owing, that order must include administration costs of 10% of the wages.¹⁰²

¹⁰¹ Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* (1995), at 30.

2. Geographical Accessibility

The Employment Practices Branch has offices throughout the province.

3. Language/Accommodation

Publications are available in English and French. The Employment Practices Program has French-speaking officers and staff. It provides interpreters for other languages. Sign language interpreters are also made available.

4. Written Reasons

ESOs generally provide written reasons to the parties.

5. Publication of Decisions and Reasons

ESOs' decisions are not published. Nor are they available to the general public, except as permitted under the *Freedom of Information and Protection of Privacy Act*.

SECTION 6: HEARINGS BY THE OFFICE OF ADJUDICATION UNDER THE EMPLOYMENT STANDARDS ACT

A. MANDATE

Members of the Office of Adjudication hold hearings for three types of proceeding that arise under the *Employment Standards Act* ("Act"):

- (a) as "adjudicators" on appeals by employees from decisions of ESOs (s. 67);
- (b) as "referees" on appeals by employers from decisions of ESOs (s. 68);
- (c) as "referees" appointed by the Director of Employment Standards ("Director") (s. 69).

There is no practical difference between acting as an adjudicator and acting as a referee.

On an appeal or reference, an adjudicator or referee may make an order amending, rescinding or affirming the order of the ESO under review. Decisions of the adjudicator or referee are final and binding, and not subject to review under the Act. The only recourse for a disappointed party is an application for judicial review under the *Judicial Review Procedure Act*.

B. PROCESS AND PROCEDURE

An employee may seek a review where the employment standards officer (1) has refused to issue an order to an employer, (2) has issued an order and the employee is of the view that it does not include all of the wages or other entitlements to which he or she is entitled.

To obtain a review, an employee must apply to the Director, within 15 days after the date on which a letter refusing an order is mailed or the date of the issue of the order. The Director may extend the period for application beyond 15 days for special reasons.

¹⁰² *Employment Standards Act*, *supra*, note 91, s. 65(1)(c). This provision sets out certain limits.

An employer may seek a review of orders made under certain provisions of the Act.¹⁰³ Application to the Director must be made within 15 days after the date the order is served or delivered upon paying the wages ordered to be paid and the penalty due on them. The Director may extend the period for application beyond 15 days for special reasons.

An employer applying for a review must provide supporting facts explaining why it is challenging the employee's entitlement to wages within 15 days of the application. The Director may waive this requirement, in whole or in part, or extend this period for special reasons.¹⁰⁴

The Director may order a reference under s. 69 where an ESO reports that an employer may have failed to pay wages owing under the Act or to comply with the Act and the regulations, or is of the view that an act, agreement, arrangement or scheme defeats "the true intent and purpose" of the legislation or is intended to have that effect.

Applications for appeals are sent to a Ministry of Labour office, in which case they are sent to the Employment Practices Branch, or sent directly to the Branch. The Branch then forwards them to the Office of Adjudication.

The appeals and references are conducted by way of oral hearing. Occasionally, written submissions are used to determine certain preliminary matters (e.g., jurisdiction, standing) or post-hearing issues (e.g., quantification of the award).

Hearings are subject to the *Statutory Powers Procedure Act*, and are conducted by one person.

In employee appeals, the parties are the employee who applied for the review, the ESO whose order or refusal to make an order is under review and any other persons, including the employer and directors of the employer, permitted by the adjudicator.

In employer appeals, the employer is the applicant, and the ESO and any other persons specified by the referee are respondents.

The Office of Adjudication does not conduct pre-hearing conferences and, generally, does not involve itself in disclosure or the document exchange. However, an adjudicator or referee occasionally will urge the parties to attempt mediation in his or her absence. The Office does not provide mediators. Mediation services are available through the Operations Division of the Ministry of Labour.

C. CASELOAD

The chart below shows the number of new cases filed with the Office of Adjudication.

Type of Hearing	1993	1994
Section 67 (Appeal by Employee)	355	293
Section 68 (Appeal by Employer)	405	323
Section 69 (references)	10	2
TOTAL	770	618

In 1993, the Office of Adjudication made 269 decisions under the Act. In 1994, it made 232 decisions.

¹⁰³ Ibid., ss. 45, 48, 51, 56.2, 58.22 or 65.

¹⁰⁴ Ibid., s. 68(5.1), as en. by S.O. 1991, Vol. 2, c. 16, s. 11(3).

D. LENGTH OF THE PROCESS

The length of the appeals process depends on how long it takes for the appeal to reach the Office of Adjudication. This will be affected by how long it takes the Ministry of Labour office to forward the application for an appeal to the Employment Practices Branch, and how long it takes for the Branch to send the file to the Office of Adjudication.

The Act provides that, on an employer appeal, the referee shall begin the hearing on the employee's entitlement to wages not more than 45 days after the application for review, "before considering any substantive issue".¹⁰⁵ The referee may allow a longer period before the hearing for special reasons.

It also provides that, in the case of a reference, the referee shall begin the hearing on the employee's entitlement to wages not more than 45 days after the appointment of the referee, before considering any substantive issue. The referee may allow a longer period before the hearing for special reasons.¹⁰⁶ The Office of Adjudication interprets the 45 day requirement as being directory.

The entire process within the Office of Adjudication—from receipt of the file to the decision—usually takes 6-9 months.

It takes about 30 days to process a file after it has been submitted by the Employment Practices Branch. The date of the hearing is usually 5 months after the Office of Adjudication has received the review.

The hearing itself usually takes 1-2 days. However, the range is from 1 hour to 25 days. The length of the hearing depends on such factors as the complexity of the issues, number of witnesses, whether or not parties are represented, and the amount in issue.

The Office deals with more simple matters through "Small Claims Days". About 16 matters are scheduled for a 2 day period. All of them have been pre-screened by the Office's staff. Two or three referees/adjudicators are assigned to hear the matters. They usually involve a 1 hour hearing if they do not settle "at the hearing room door".

The Act requires the referee to issue his or her decision within 90 days of the first day of the hearing, unless a referee appointed by the Minister of Labour grants an extension for special reasons.

Decisions are rarely given at the hearing. Generally, reasons are released 1-3 months after the hearing has ended. The length of time it takes depends on the complexity of the hearing, number of witnesses, post-hearing submissions, and the adjudicator/referee's workload.

E. ACCESS ISSUES

1. Fees, Expenses and Costs

Employees are not subject to any application fees. However, the Act requires employers who apply for a review to pay the wages ordered to be paid and the penalty due on them as a condition of the application.¹⁰⁷

The Office of Adjudication does not have jurisdiction to order costs.

¹⁰⁵ *Ibid.*, s. 68(5.2), as en. by S.O. 1991, Vol. 2, c. 16, s. 11(3).

¹⁰⁶ *Ibid.*, s. 69(1.4), as en. by S.O. 1991, Vol. 2, c. 16, s. 12.

¹⁰⁷ *Ibid.*, s. 65(1)(c).

2. Geographical Accessibility

The Office of Adjudication has one office, located in Toronto, but travels throughout the province to hold hearings.

3. Language/Accommodation

The Office of Adjudication publishes brochures in both French and English. Where necessary, hearings have been conducted in French and correspondence and decisions have been written in French.

Interpreters are retained on a party's request. This occurs approximately 10 times per year.

The Office of Adjudication's hearing rooms are wheelchair accessible. If requested, the Office would provide whatever aids are required to assist people with other types of disability.

4. Written Reasons

Written reasons are always provided to the parties.

5. Publication of Decisions and Reasons

Copies are available in the Ministry of Labour library and on Quicklaw. Copies are also available to the public, on a limited basis, in the Office of Adjudication's library.

F. BUDGET

In 1995, the annual budget for the entire Office of Adjudication was \$1.3 million, which funded the two different responsibilities of the Office (*Employment Standards Act* and *Occupational Health and Safety Act*). Approximately \$306,000 is related to hearings, covering costs such as expenses for travel and accommodation, hearing room rentals, consulting (e.g., retaining outside counsel, French language services).

SECTION 7: SOCIAL ASSISTANCE REVIEW BOARD

A. MANDATE

The Social Assistance Review Board ("SARB") hears appeals under the *General Welfare Assistance Act* ("GWAA"), *Family Benefits Act* ("FBA") and the *Vocational Rehabilitation Services Act* ("VRSA").

General welfare assistance is administered by municipalities and First Nations, and provides financial support for needy people on a short-term basis. Decisions about eligibility for, and the amount of, benefits are made at the local level, by municipal or regional welfare administrators or, in the case of First Nations, by a band welfare administrator, who has been appointed by the band council.

The family benefits program is a provincial scheme, and provides financial support to people on a long-term basis, for example, low income, single parent families and individuals with permanent disabilities. Decisions about eligibility for, and the amount of, benefits are made by local provincial officials.

The vocational rehabilitation services is a provincial program that assists individuals with permanent disabilities to become employable by providing assessment, training, counselling,

placement and other services. Decisions about eligibility for, and the amount and nature of, vocational rehabilitation services are made by local provincial officials.

A person has a right of appeal to SARB a decision to refuse, reduce, suspend or cancel benefits under the GWAA, FBA and the VRSA.

A party may appeal a SARB decision to the Divisional Court on a question that is not a question of fact alone.

B. PROCESS AND PROCEDURE

1. General

An applicant or recipient begins the process by filing a Notice of Request for Hearing (Form 1) with the Board. SARB sends an acknowledgment letter to the respondent (the Ministry of Community of Social Services and, in the case of the GWAA, the municipality or band). The appellant may request interim financial assistance pending the outcome of the hearing on the Form 1, in which case SARB staff will review his or her financial circumstances.

The *Statutory Powers Procedure Act* applies to appeals before the Board, but not to determinations of applications for interim financial assistance.

SARB hearings are held in private. The respondent may make written submissions to the panel; before the hearing, the appellant may examine written submissions and any written or documentary evidence or reports that the respondent proposes to use. In some cases, with the consent of the parties, SARB uses "paper hearings" as an alternative to oral hearings. "Paper hearings" involve written submissions or conference calls. Approximately 300 such hearings were held in the 1993-94 fiscal year.

Generally, hearings are before a one person panel. Three members may be assigned to a panel where SARB is reconsidering its own decision, or where the case is legally complex or involves the *Canadian Charter of Rights and Freedoms*.

SARB has not adopted ADR measures. It advises that there are two reasons for this: (1) the parties are unequal, (2) there is little room for mediation as the dispute involves the minimum level of financial support. Parties, however, are encouraged to resolve issues prior to the hearing, particularly where the issue arises from a failure to communicate pertinent information needed to determine eligibility for benefits.

2. Measures to Deal with an Increasing Caseload

SARB has been forced to cope with an increasing volume of appeals and requests for interim assistance. In response, during the 1992-93 fiscal year, it developed certain measures, which it tested, refined and continues to apply.

Smaller Panels. The decision to use one person panels except in the most complex cases allows SARB to schedule more hearings.

Notice and Adjournment Practices. Parties are given longer advance notice of hearing dates. In return, SARB has become much stricter about granting adjournments, which formally were permitted upon request; adjournment or rescheduling is now allowed only exceptionally. As a result, more hearings are proceeding as scheduled. The number of adjournments decreased 54% in the 1993-94 fiscal year.

Time Allocation. Cases are screened. Straightforward cases are overbooked. SARB uses a computerized scheduling program to assist in the scheduling of hearings.

Inactive List. Since late 1992-93, SARB has used an “inactive list”. Its purpose is to save SARB from using scheduling and hearing resources for matters that are not ready to proceed. Appeals that are not ready on the scheduled hearing date for a good reason are put on the inactive list. If the appellant does not notify SARB within one year of being placed on the list that it is ready to set a hearing date, SARB will close the file. When appeals involving permanently unemployable or disabled status are received, they are automatically placed on the inactive list if the appellant is represented by legal counsel. The case is not scheduled until the representative notifies SARB that the case is ready. If no request for a hearing date is received within one year, SARB closes the case.

Shorter Decisions/Orders. Since 1992-93, SARB has been using a format for shorter written reasons in routine cases. The Board has developed a one-page order for use in some straightforward cases where the panel considers it appropriate.

C. CASELOAD

SARB annual reports provide relatively detailed data about caseload and dispositions. Data on an issue-by-issue basis is available about the number of appeals filed, the number of decisions given and the outcome of appeals. Similarly, detailed information is given about applications for interim assistance.

1. Number of Appeals Filed

SARB has experienced a significant increase in its caseload. During the fiscal year 1993-94, it received 44.7% more appeals than it did in the fiscal year 1992-93, which was a 85.6% increase over the number of appeals received in the fiscal year 1991-92.

Table 1 shows the number of appeals filed since the fiscal year 1988-89.

TABLE 1

Fiscal Year	FBA/VRS	GWA	TOTAL
1988-89	2364	1943	4307
1989-90	2045	1821	3866
1990-1991	2270	2243	4513
1991-1992	2766	3932	6698
1992-1993	3172	5418	8590
1993-94	5078	7373	12431
1994-1995 (Feb 28)	4991	6002	10993

This Table does not include requests for interim financial assistance. (See Table 10.)

The increase in SARB's caseload may be attributed to various factors: the recession of the 1990's which increased the caseload under the GWAA and FBA; regulation changes under the GWAA and FBA that reduced payment rates for sponsored immigrants; and the adoption of enhanced verification procedures, involving more frequent monitoring, for permanently unemployable and disabled cases.

2. Number of Hearings vs. Number of Decisions

SARB reports on the number of hearings held in a fiscal year separately from the number of decisions it issues. Its detailed information relates to decisions, as opposed to hearings. Table 2 shows the number of hearings held and the number of decisions issued for a five year period ending in fiscal year 1993-94.

TABLE 2

Fiscal Year	1989-90	1990-91	1991-92	1992-93	1993-94
Hearings	1931	1810	2146	3108	5536
Decisions	1951*	1731	2030	2614	5190

* Decisions released in 1989-90 were greater than the number of hearings held in 1989-90 since some of the decisions were carried over from hearings held in 1988-89.

3. Number of Decisions Issued

Table 3 shows the number of board decisions made under each of the statutes.

TABLE 3

	1989-90	1990-91	1991-92	1992-93	1993-94
FBA	1048 (54.3%)	907 (52.4%)	929 (45.8%)	1122 (42.9%)	1936 (37.3%)
GWAA	860 (44.5%)	792 (45.8%)	1074 (52.9%)	1460 (55.9%)	3214 (61.9%)
VRS	23 (1.2%)	32 (1.8%)	27 (1.3%)	32 (1.2%)	40 (0.8%)
TOTAL	1931 (100%)	1731 (100%)	2030 (100%)	2614 (100%)	5190 (100%)

SARB annual reports provides a detailed breakdown of information respecting decisions. Information is available on the following:

- the number of SARB decisions by the type of appeal (on a refusal, cancellation/suspension, amount/reduction, other);
- the number of SARB decisions by the type of issue under appeal under the FBA, GWAA, and VRSA;
- outcome of SARB decisions (appeal granted, appeal denied, referred back, other) for each of the programs;
- outcome of SARB decisions (appeal granted, appeal denied, referred back, other) by type of issue under each of the programs
- outcome of SARB decisions (appeal granted, appeal denied, referred back, other) related to representation of the appellant (appellant alone; legal representative; family, friend or other representative; heard in absentia).
- regional breakdown of decisions by program

4. Number of Board Decisions by Type of Issue

Under the FBA, the five issues most commonly decided in the five year period ending in fiscal year 1993-94 related to the following issues:

- whether the appellant was not permanently unemployable or disabled;
- overpayment;
- the appellant was dissatisfied with the amount of the payment;
- whether the appellant's assets/income were in excess;
- whether the appellant was living as a single person

Table 4 shows the incidence of these issues.

TABLE 4

	Employ/ Disabled	Overpayment	Dissatisfied	Excess	Single Person	Other
1989-90	596 (56.9%)	171 (16.3%)	50 (4.8%)	62 (5.9%)	21 (2%)	148 (17.2%)
1990-91	513 (56.6%)	138 (15.2%)	67 (7.4%)	47 (5.2%)	33 (3.6%)	109 (12%)
1991-92	536 (57.7%)	145 (15.6%)	45 (4.8%)	57 (6.1%)	21 (2.3%)	125 (13.4%)
1992-93	621 (55.3%)	194 (17.3%)	54 (4.8%)	66 (5.9%)	28 (2.5%)	159 (14.2%)
1993-94	920 (47.5%)	340 (17.6%)	168 (8.7%)	121 (6.3%)	69 (3.9%)	318 (16.4%)

Under the GWAA, the four issues most commonly decided were the following:

- job search and job loss;
- assets/income in excess;
- the appellant was dissatisfied with the amount of the payment; and
- failure to provide information.

Table 5 shows the incidence of these issues.

TABLE 5

	Job Search/loss	Excess	Dissatisfied	Failure Inform	Other
1989-90	433 (50.4%)	83 (9.7%)	53 (6.2%)	67 (7.8%)	224 (26%)
1990-91	414 (52.3%)	85 (10.7%)	78 (9.9%)	39 (4.9%)	176 (22.2%)
1991-92	326 (30.4%)	152 (14.1%)	88 (8.1%)	78 (7.2%)	430 (40%)
1992-93	277 (19.0%)	178 (12.1%)	118 (8.1%)	106 (7.3%)	781 (53.5) ¹⁰⁸
1993-94	527 (16.4%)	430 (13.4%)	310 (9.7%)	268 (8.3%)	1679 (52.2%)

Under the VRSA, the 3 issues most commonly decided were the following:

- program/equipment not beneficial;
- not disabled; and
- progress insufficient.

¹⁰⁸ The 1992-93 fiscal year records the second highest category as "Gross vs Net" with 210 cases or 14.4% of the caseload. These cases were included in the "Other" column.

Table 6 shows the incidence of these issues.

TABLE 6

	Not Beneficial	Not Disabled	Insuff Progress	Other
1989-90	6 (26.1%)	3 (13.0%)	4 (17.4%)	10 (43.4%)
1990-91	16 (50%)	7 (21.9%)	5 (15.6%)	4 (12.5%)
1991-92	7 (25.9%)	8 (29.6%)	2 (7.5%)	10 (37%)
1992-93	10 (31.3%)	5 (15.6%)	5 (15.6%)	12 (37.5%)
1993-94	16 (40%)	8 (20%)	3 (7.5%)	13 (32.5%)

5. Cases Closed Without A Hearing

Many cases are closed without a hearing. The appeal may be withdrawn by the appellant or his or her representative, or by the respondent, or the file may be closed by SARB. SARB advises that the usual reasons that an appellant's case is withdrawn is that the matter has been resolved or the appellant no longer wishes to pursue the matter. In the case of a respondent, it withdraws its request for a reconsideration. SARB may close the case for various reasons, including: no jurisdiction, closed from the inactive list, no contact from the appellant; reconsideration hearing not granted. Table 7 shows the number of cases that have been closed without a hearing in the five year period ending in fiscal year 1993-94.

TABLE 7

Fiscal Year	1989-90	1990-91	1991-92	1992-93	1993-94
Cases Closed	1718	2126	2243	4436	4512

Table 8 shows the percentage breakdown of the cases that have been closed without a hearing. The overwhelming majority of cases are closed because they are withdrawn by the appellant or his or her representative. An almost negligible number are closed because the respondent withdraws its request for a reconsideration. The number of cases closed by SARB itself declined from 25% to 9.4%

TABLE 8

	1989-90	1990-91	1991-92	1992-93	1993-94
Withdrawn by appellant or representative	73.9%	75.6%	84.9	82.7%	90.1%
Withdrawn by respondent	0.2%	0.2	—	0.2%	0.5%
Closed by SARB	2.5%	24.2	15.1	17.1%	9.4%
TOTAL	100%	100%	100%	100%	100%

6. Cases Not Disposed/Carried Forward into the Next Fiscal Year

SARB annual reports indicate the number of cases that are carried forward into the next fiscal year. "Cases carried forward" include the following categories of cases: scheduled but not yet heard, not scheduled at the request of the appellant or representative, rescheduled but not yet heard, received but not yet scheduled.

Table 9 presents information about the number of cases carried forward in each of the five years in a five year period ending in fiscal year 1993-94.

TABLE 9

Fiscal Year	1989-90	1990-91	1991-92	1992-93	1993-94
Cases brought forward from prior year (A)	1124	1341	1918	2909 ¹⁰⁹	3948
Appeals received this year (B)	3866	4513	6698	8590	12431
Total of A and B = C	4990	5854	8616	11499	16379
Cases closed without a hearing (D)	1718	2126	2243	4436	4512
Hearings Held (E)	1931	1810	2146	3108	5536
Total of D and E = F	3649	3936	4389	7544	10048
Cases carried forward to next fiscal year (C-F)	1341	1918	4227	3955	6331

7. Applications for Interim Assistance

During the five year period ending in fiscal year 1993-94, an increasing percentage of appeals have been accompanied by requests for interim assistance. The number of such requests has also increased dramatically.

In the fiscal year 1989-90, 54% of appeals were received with requests for interim assistance. In 1992-93, this percentage rose to 67.1% and, in 1993-94, it was 80.1%.

Table 10 shows the number of interim requests that were received and decided and the outcome of those decisions.

TABLE 10

Fiscal Year	1989-90	1990-91	1991-92	1992-93	1993-94
Requests for interim assistance received	2089	2589	4467	5762	9957
Requests for interim assistance decided	2089	2589	4468	6679	9697
Requests for interim assistance granted	1210	1426	1577	2471	4945
Requests for interim assistance not granted	879	1163	2891	4208	4752

D. LENGTH OF THE PROCESS

SARB has advised that, as a result of a 45% increase in the number of appeals received in 1993-94 and carried over to 1994-95, the time taken to process an appeal has increased.

1. How Long does the Process Take?

The average length of time for the 1993-94 fiscal year from receipt of the Form 1 (the request for the hearing) to the release of the panel's decision was 154 *working* days. The average length of time for the period from April 1, 1994 to February 28, 1995 was 205 *working* days.

¹⁰⁹ This number was amended from the previous year's annual report.

The average length of time for the 1993-94 fiscal year from receipt of the Form 1 to the hearing date was 117 *working* days. The average length of time for the period from April 1, 1994 to February 28, 1995 was 159 *working* days.

The average length of time for the 1993-94 fiscal year from the hearing to the release of the panel's decision was 37 *working* days. The average length of time for the period from April 1, 1994 to February 28, 1995 was 46 *working* days.

2. Duration of Hearings

From the period from April 1, 1994 to February 28, 1995, the length of a hearing ranged from 45 minutes to 3 days; the average length was 90 minutes. The duration of a hearing depends on a number of factors, including the type and complexity of the issue, whether legal counsel or witnesses are present and whether an interpreter is required.

E. ACCESS ISSUES

1. Representation and its Impact on Outcomes

SARB reports data about the extent to which appellants are represented, and correlates this information to the outcomes of the proceedings. Annual reports indicate whether the decision was the appeal being granted or denied or referred back for reconsideration by the provincial director or municipal administrator or some other type of decision.

Table 11 shows the extent to which appellants have been represented during the five year period ending in fiscal year 1993-94, and whether they have been represented by a "legal representative" or another person.

TABLE 11

	1989-90	1990-91	1991-92	1992-93	1993-94
Appellant alone	666 (34.5%)	692 (40%)	643 (31.7%)	751 (28.7%)	1601 (30.9)
Legal representative	541 (28%)	486 (28.1%)	556 (27.4%)	898 (33.8%)	1023 (19.7)
Family, friend or other representative	202 (10.5%)	131 (7.5%)	323 (15.9%)	364 (13.6%)	922 (17.8)
Heard in absentia	522 (27%)	422 (24.4%)	508 (25%)	601 (24.9%)	1644 (31.6)
Total decisions (%)	1931 (100%)	1731 (100%)	2080 (100%)	2614 (100%)	5190 (100)

SARB's annual reports indicate that there is a relationship between the type of representation and the outcome of the appeal.

The rate of appeals being granted is highest when there is legal representation, and somewhat lower when someone else represents the appellant and lower still when the appellant appears only. It is lowest when the matter is heard in absentia. The rate of appeals being denied is the converse.

During the five year period, where appellants have been had legal representatives, the panel decision was to grant the appeal in 67-68% of the cases; in one year (1992-93), in 77.5% of the cases of legal representation was the appeal granted. The rate of appeals being denied in such cases ranged from 22.9-28.4, with a low of 17.4% in 1992-93. The balance was made of decisions that were "referred back" and other decisions.

Where appellants have been assisted by “non-legal representatives”, the panel decision was to grant the appeal in 47.9-58.2% of the cases. The rate of appeals being denied ranged from 34.1-41.2%. The balance was made of decisions that were “referred back” and other decisions.

Where appellants have appeared alone, the panel decision was to grant the appeal in 33.1-41.0% of the cases. The rate of appeals being denied ranged from 44.1-50.7%. The balance was made of decisions that were “referred back” and other decisions.

2. Costs and Fees

SARB does not have jurisdiction to require any party to pay fees or to order a party to pay costs to another. Nor does it have authority to order a party to pay SARB’s expenses.

3. Geographical Accessibility

SARB has one office, located in Toronto. About two-thirds of the Board members are based in Toronto; the remainder are from the Western, Northern and Eastern Regions of the Province.

Members travel to sites throughout the province to hold hearings.

4. Language/Accommodation

Hearings are conducted in French when requested by an appellant. In such cases, correspondence and notices are in both French and English. In the fiscal year 1993-94, 87.4% hearings were held in English; 1.9% hearings were held in French; 10.7% hearings involved an interpreter for an appellant who spoke another language. In the fiscal year 1992-93, 93.0% hearings were held in English; 1.8% hearings were held in French; 5.2% hearings involved an interpreter for an appellant who spoke another language.

Persons with disabilities are accommodated at hearings. SARB will arrange appropriate measures (for example, accessible hearing locations, sign language interpreter).

5. Written Reasons

SARB issued 5190 decisions in the 1993-94 fiscal year. Written reasons were given in 49% of the decisions. In the period from April 1, 1994 to February 28, 1995, SARB issued 4374 decisions; written reasons were given in 54.2%. Decisions are sent to the parties.

Decisions may be given without written reasons in a number of circumstances, including the following: where the appellant has not been present for the hearing and the appeal heard in absentia and is generally denied; where the matter has been resolved; where SARB has no authority to deal with the matter; where the appeal is out of time.

6. Publication of Decisions and Reasons

Selected decisions are published anonymously in digested form in the Board’s *Summaries of Decisions*. Decisions are selected by a publications committee based on their relevance and educational value. The *Summaries* is distributed free to charge to over 450 organizations. Full text of the decisions digested in *Summaries* is available upon request

F. COST OF SARB

This chart sets out the expenditures for the past two fiscal years.

Description	1993-94	1994-95
Salaries and Wages	1,640,807	1,671,227
Employee Benefits	328,629	163,609
Transportation & Communications	347,487	424,598
Services	2,294,677	2,310,219
Supplies & Equipment	207,182	357,228
Total	4,818,782	4,926,881

Most of "services" is attributable to the salaries and benefits paid to the members of SARB, who are appointed by Order in Council.

Approximately 5% of the expenditures related to the payment of expenses arising from SARB members travelling throughout the province to hold hearings. In 1993-94, SARB spent \$196,900 on travel and \$46,200 on renting hearing rooms. In 1994-95, it spent \$225,000 on travel and \$36,000 on hearing room rentals.

SECTION 8: ONTARIO HUMAN RIGHTS COMMISSION

A. MANDATE

The *Ontario Human Rights Code* ("Code")¹¹⁰ creates rights to equal treatment without discrimination with respect to employment, accommodation, membership in "vocational associations",¹¹¹ the making of contracts, and the provision of services, goods and facilities.¹¹² In each of these areas, the Code establishes prohibited grounds of discrimination. There is some variation in the prohibited grounds, depending on the area.

The Code gives the Ontario Human Rights Commission ("OHRC") numerous functions. Enforcement of the Code is one. While its other functions—for example, research and education, investigating and responding to problems of discrimination in communities, helping public and private organizations develop programs to alleviate tensions and conflicts arising from discrimination—may be very important to achieving the purposes of the Code, it is the Commission's enforcement responsibility that involves it directly in disputes. The OHRC, however, does not hold hearings to resolve disputes between parties. Under the Code, hearings may be held by the board of inquiry, before which the OHRC is a party.

The primary means by which the Code is enforced is through the complaints procedure. However, the Code also creates certain offences, which may be prosecuted with the consent of

¹¹⁰ R.S.O. 1990, c. H.19. The *Statute Law Amendment Act (Government and Management Services)*, 1994, S.O. 1994, c. 27, s. 66, made several amendments to the Code. Most relate to the board of inquiry, the body that may hear a human rights complaint that has been investigated by the Commission. Formerly, boards of inquiry were appointed on a "an as-needed basis", from a panel of available part-time adjudicators. With the advent of the *Statute Law Amendment Act (Government and Management Services)*, 1994, the board of inquiry became a standing administrative tribunal, the members of which are appointed by the Lieutenant Governor in Council.

¹¹¹ Section 6 creates a right to equal membership in any trade union, trade or occupational association or self-governing profession.

¹¹² Part I of the Act deals with "Freedom from Discrimination".

the Attorney General.¹¹³ It appears that there have been no prosecutions under the Code since 1981.

A person who believes that his or her right under Code has been infringed may file a complaint with the OHRC. In addition, the OHRC may initiate a complaint itself or on the request of any person.¹¹⁴

Except in certain circumstances,¹¹⁵ the OHRC must investigate complaints and try to settle them.¹¹⁶ Investigations may be undertaken by members of the OHRC or by OHRC employees authorized by the OHRC.¹¹⁷ The Code gives the investigators power to enter premises, except dwellings,¹¹⁸ and power to request production of relevant documents and things.

Where the OHRC does not effect a settlement, it may refer the subject-matter of the complaint to the board of inquiry if it appears that an inquiry is appropriate and the evidence warrants it.¹¹⁹ The board of inquiry is discussed in the next section.

B. PROCESS AND PROCEDURE

1. General

A person may make an allegation that the Code has been violated by writing or calling one of the OHRC's 15 regional offices. The case is assigned to an intake officer. At this point, the case is not yet a "complaint" within the meaning of the Code. It becomes a "complaint" only when the complainant signs a complaint form that has been prepared by a human rights officer, which puts the OHRC under a general duty to investigate the complaint and try to settle it.

Many files, however, are informally resolved by Early Settlement Initiatives (or "ESIs"), which do not entail the filing of a formal complaint or a formal investigation. The intake officer assigned to the case will intervene, perhaps by contacting the respondent, mediating between the parties, or simply clarifying the nature of the allegation with the complainant. This may result in withdrawal of the allegation or a settlement between the complainant and the respondent.

Where the matter is not resolved by an ESI, a formal complaint is filed with the OHRC. A copy of the complaint is sent to the respondent, who is entitled to file a reply. After this exchange of documents, an investigative officer is appointed. It may make considerable time for this appointment to take place; cases may be in the "pending investigation" stage for three

¹¹³ Code, *supra*, note 111, s. 44. It is an offence to: (1) "infringe or do, directly or indirectly, anything that infringes a right" under Part I of the Code (s. 9); (2) "hinder, obstruct or interfere with a person in the execution of a warrant or otherwise impede an investigation under [the] Act" (s. 33(11)); (3) contravene an order of the board of inquiry (s. 44(1)).

¹¹⁴ *Ibid.*, s. 32.

¹¹⁵ *Ibid.*, s. 34.

¹¹⁶ *Ibid.*, s. 33(1).

¹¹⁷ *Ibid.*, s. 33(2).

¹¹⁸ To enter a dwelling, a person must have the consent of the occupier or be authorized to enter by a warrant: *ibid.*, ss. 33(4), 33(8).

¹¹⁹ *Ibid.*, s. 36(1) as enacted by S.O. 1994, c. 27, s. 66(12).

months. The investigator conducts an investigation, after which he or she circulates a report of his or her findings to the complainant and the respondent. Efforts are made to settle the complaint. Some settlements require the OHRC's approval.¹²⁰

Once a formal complaint has been filed, the matter may conclude in various ways. As noted above, the OHRC may decide not to deal with the complaint in certain cases: for example, if it is "trivial, frivolous, vexatious or made in bad faith".¹²¹ The complaint may be withdrawn or settle. The OHRC may decide that the matter should not be referred to the board of inquiry. In fact, relatively few cases proceed to a hearing by the board of inquiry.¹²²

2. Measures to Address Case "Backlog"

In late 1990, the OHRC initiated its Case Management Plan ("CMP") to respond to a significant increase in its caseload. The CMP involved enhanced training for officers, established new productivity standards for them, and confined their caseloads to a maximum of ten at any one time. The OHRC established a 10-person task force to deal with 400 of its oldest cases. It began to focus more on informal settlement.¹²³

Under the Plan, a case co-ordinator monitors the cases that have not been assigned to officers and assigns them in the order in which the complaint was filed.

In late 1991, the government allocated \$6 million to the OHRC for the purpose of disposing of its caseload. The task force was expanded to 52 persons. It was given a one-year mandate to deal with formal complaints that were more than 6 months old and not under investigation.¹²⁴

C. CASELOAD

1. Incoming Cases

The chart below indicates the number of complaints received by the OHRC. (In this case, "complaints" is not used in the technical sense of being a formal complaint, but is an allegation that the Code has been violated.)

1991-92	1992-93	1993-94	1994-95
2535	2317	2286	2452

In 1991-92 and 1993-94, 76% of the complaints were employment-related; in 1992-93, 73% related to employment.

¹²⁰ "Fully manifested settlements" may be made without the Commission's approval. Such settlements do not require any future act on the part of the respondent. Typically, fully manifested settlements involve a payment of money. By contrast, a "jurisdictional settlement" involves the respondent undertaking to perform certain acts in the future; they require Commission approval.

¹²¹ Code, *supra*, note 110, s. 34(1)(a).

¹²² In the 4 year period from 1991-92 to 1994-95, the Commission "closed" a case by a decision to appoint a board of inquiry in less than 4% of the cases for two years. The highest percentage was 15.0% in 1992-93. In one year, it was 9.1%.

¹²³ Ontario Human Rights Commission, *Annual Report 1991-1992* (1992), at 17.

¹²⁴ *Ibid.*, at 25.

During the fiscal years 1993-94 and 1994-95, the most frequently alleged grounds of discrimination were handicap and race. The number of cases opened on these bases significantly exceeded the number of cases alleging discrimination on the other grounds.

During the fiscal year 1993-94, there were 1130 *formal* complaints, of which 890 were employment-related.

2. Dispositions

The chart below indicates the number of complaints resolved by ESIs in each of the fiscal years. (ESIs are recorded when the file is closed.)

1992-93	1993-94	1994-95
1313	1177	865

The chart below shows the number of cases closed by the OHRC in each of the fiscal years. It covers all cases, and thus includes ESIs and formal complaints that have been closed.

1991-92	1992-93	1993-94	1994-95
3200	2659	2122	2105

In the areas of employment, accommodation and services, roughly 80% of the cases are settled or withdrawn.

Of the 2105 cases closed during the fiscal year 1994-95, 865 (41%) resulted from ESIs. 14% were settled after formal complaints were filed, and 14% were withdrawn. Only 2% were referred to a board of inquiry.

3. Inventory of Cases

The number of formal complaints peaked at about 3000 cases in 1991, and then declined to about 1800 cases for a period of several months in late 1992-early 1993. Then the number of formal cases in progress began to increase. As of March, 1995, it was about 2400.

D. LENGTH OF THE PROCESS

In the fiscal year 1994-95, complaints were resolved through ESIs within an average of 160 days from the date on which the complainant first contacted the OHRC.¹²⁵ The median period was 132 days.

In the fiscal year 1994-95, the average time from the date that the complaint was signed to the date that the complaint was closed was 681 days. The median period was 624 days. (It should be noted that there would be a period of time between the date the complainant first contacted the OHRC and the date that he or she signed the formal complaint. During that period, the OHRC would endeavour to resolve the matter informally: see discussion above.)

¹²⁵ The initial contact could be as informal as a telephone call.

E. ACCESS ISSUES

1. Fees, Expenses and Costs

Complainants are not charged fees nor required to reimburse the OHRC for its investigative and other costs.

2. Geographical Accessibility

The OHRC has head office in Toronto, and 15 regional offices throughout the province (including 3 Toronto regional offices). Staff at regional offices receive and investigate complaints.

3. Language/Accommodation

The OHRC can provide all of its services in French, including the investigation of complaints. Depending on the circumstances, it may participate in French at the board of inquiry. The OHRC will provide services in whatever language is required.

Disabled people are accommodated.

4. Written Reasons

Where the Commission decides not to deal with a complaint, it advises the complainant in writing of its decision and reasons and of the procedure under the Act for having the decision reconsidered.

Where it decides not to refer a matter to the board of inquiry, it advises, in writing, the complainant and the person against whom the complaint has been made of its decision and reasons and of the procedure under the Act for having the decision reconsidered.

5. Publication of Decisions and Reasons

The OHRC may publicize settlements without publishing the name of the complainants or identifying information. It reveals the identity of a complainant only with his or her consent. Otherwise, the *Freedom of Information and Protection of Privacy Act* prevents such disclosure.

SECTION 9: BOARD OF INQUIRY UNDER THE HUMAN RIGHTS CODE

A. MANDATE

Until recently, boards of inquiry were appointed on an *ad hoc* basis by the Minister of Citizenship ("Minister") to hold hearings under the *Human Rights Code*. Effective April 17, 1995, the *Statute Law Amendment Act (Government Management and Services)*, 1994¹²⁶ replaced the *ad hoc* boards with a standing board of inquiry, the members of which are appointed by the Lieutenant Governor in Council. There is still a roster of 35 part-time adjudicators, who are located in various geographical areas of the province and who conduct hearings in their respective areas.

¹²⁶ *Supra*, note 110.

The OHRC may refer the subject-matter of a human rights complaint to the board of inquiry, in which case the board must hold a hearing.¹²⁷ Formerly, the OHRC requested the Minister to appoint a board of inquiry.¹²⁸ The Minister was under a duty to appoint one or more persons from an existing panel of members.¹²⁹

A hearing by the board has three purposes:

1. to determine whether a right of the complainant under the *Human Rights Code* has been infringed;
2. to determine who infringed the right; and
3. to decide upon an appropriate order.

The board of inquiry has a broad authority to make remedial and other orders. It may order the party that has infringed the complainant's right to "do anything" to achieve compliance with the Code. The board may direct it to make restitution, including monetary compensation, for losses caused by the infringement and, where the infringement has been wilful or reckless, may direct that the compensation include an award for "mental anguish". The maximum for such an award is \$10,000. The board may also make orders to prevent harassment.¹³⁰

Under section 34(6) of the *Code*, the Chair of the board of inquiry appoints a panel to hold the hearing.

B. PROCESS AND PROCEDURE

A board of inquiry hearing may involve several parties. The OHRC is a party, and has carriage of the complaint. Other parties include the complainant, any person who the OHRC alleges has infringed the right in question, and any person appearing to the board of inquiry to have infringed the right.

The *Statutory Powers Procedure Act* applies to hearings. It is expected that case management procedures and procedural rules will be in effect on August 1, 1995.¹³¹ The case management process will involve pre-hearing procedures and will address various issues, including disclosure, mediation and preliminary motions.

Where all the parties agree to minutes of settlement, which are approved by the OHRC, the board of inquiry will issue an order approving them at the hearing.

Decisions of the board of inquiry may be appealed to the Divisional Court. Appeal may be made on questions of law or fact or both.

C. CASELOAD

The chart appended to this section indicates that the caseload has diminished.

¹²⁷ Code, *supra*, note 110, s. 36(1), as enacted by S.O. 1994, s. 66(12).

¹²⁸ *Ibid.*, s. 36(1), as repealed by S.O. 1994, c. 27, s. 66(12).

¹²⁹ *Ibid.*, s. 38(1), as repealed by S.O. 1994, c. 27, s. 66(14).

¹³⁰ *Ibid.*, s. 41(1), as am. by S.O. 1994, c. 27, s. 66(22).

¹³¹ Rules may be made under the authority of s. 35(5) of the Code, *supra*, note 111, as enacted by S.O. 1994, c. 27, s. 66(10), and s. 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as enacted by S.O. 1994, c. 27, s. 56(38).

D. LENGTH OF THE PROCESS

During the 1994-95 fiscal year, it took an average of 12 months from referral of the complaint to the board of inquiry's decision. In this period, about 70% of the cases settled before or during the hearing.

During the 1994-95 fiscal year, it took an average of 8 months from referral of the complaint to the date of the board of inquiry hearing. The average hearing duration was 10-15 days.

The Act requires that the board of inquiry "make its finding and decision within thirty days after the conclusion of its hearing".¹³²

E. ACCESS ISSUES

1. Representation

Most parties are represented by lawyers or agents. About 5% represent themselves. About 5% of complainants are represented by agents or are assisted by community groups.

2. Fees, Expenses and Costs

The board of inquiry charges no fees.

Under the *Code*, the board of inquiry has a discretion to order the OHRC to pay to the person complained against costs as are fixed by the board. It may make such an order where it dismisses a complaint and finds that "the complaint was trivial, frivolous, vexatious or made in bad faith or, in the particular circumstances, undue hardship was caused to the person complained against".¹³³

3. Geographical Accessibility

Hearings are usually held in Toronto for matters arising in the greater Toronto area. In other cases, hearings are held in the geographical centre outside of Toronto in which most of the parties are located. There are 10 such centres.

4. Language/Accommodation

Bilingual adjudicators are available. Interpretation services are provided in French and English. Necessary arrangements are made to accommodate disabled individuals at hearings.

5. Written Reasons

The board of inquiry provides written reasons in all interim and final decisions.

6. Publication of Decisions and Reasons

Decisions are provided to selected libraries and Ontario government ministries. Effective August 1, 1995 decisions will be available on QuickLaw.

¹³² *Ibid.*, s. 41(5).

¹³³ Section 41(4).

BOARD OF INQUIRY CASELOAD DATA

FISCAL YEAR	# COMPLAINTS RECEIVED	# DECISIONS ISSUED		# ACTIVE COMPLAINTS AT END OF FISCAL YEAR
1991-92	56	27 decisions	13 orders and minutes of settlement	47
			14 decisions	
1992-93	227	43 decisions	19 orders and minutes of settlement	148*
			24 decisions	
1993-94	70	97		121
1994-95	37	68		90

* A number of claims were grouped together and heard in single hearings.

THE ROLE OF THE CIVIL JUSTICE SYSTEM IN THE CHOICE OF GOVERNING INSTRUMENT

ROBERT HOWSE AND MICHAEL J. TREBILCOCK

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THE ROLE OF THE CIVIL JUSTICE SYSTEM IN THE CHOICE OF GOVERNING INSTRUMENT

ROBERT HOWSE AND MICHAEL J. TREBILCOCK

1. INTRODUCTION

Despite the traditional emphasis that lawyers and legal academics place on courts and judges, the civil justice system comprises only one sub-set of institutions and rules through which the state seeks to regulate relationships among private actors in civil society as well as (to some extent) between the individual and the state. The "instrument choice" approach taken in this paper treats the civil justice system not as an end in itself, or as embodying its own set of purposes or goals, but rather as a means or instrument of government action.

The paper begins by setting out an analytical framework for instrument choice and its relationship to the civil justice system. We consider both economic rationales for intervention, such as the enabling of market transactions through the definition and enforcement of property rights or the correction of market failures such as monopoly, externalities or asymmetrical information, as well as non-economic rationales such as corrective and distributive justice. We then proceed to consider the range of instruments that may be available to achieve one or more of these rationales, and the extent to which each of these instruments implicate the civil justice system either in its present, or a revised, form. We then proceed to examine five case studies of areas of legal regulation where perceived problems or shortcomings in the existing system has led to considerable discussion or debate about the role of the civil justice system in the vindication of public values. These areas are: medical misadventure, construction liens, the employment relationship, human rights legislation, and landlord/tenant. In each instance, the departure point for our analysis of the choice of instrument is the existing situation in Ontario and the debate to which it has given rise. We have deliberately selected areas that have been the subject of review by policymakers in the recent past, and attempt to show how an instrument choice perspective could enrich or advance the process of policy review or reform.

In our choice of case studies, we have deliberately chosen not only areas where perceived shortcomings in instruments linked to civil litigation have led to proposals for alternatives, whether Alternative Dispute Resolution or an administrative process to replace civil litigation, but also areas where there is already considerable experience with either the replacement or supplementation of court-based instruments with alternatives, such as the enforcement of human rights legislation and the prevention of workplace accidents. We view instrument choice as about the weighing of real world alternatives, each of which is likely to be imperfect, or more precisely to involve trade-offs or even (to use Calabresi's expression¹) tragic choices.

It is all too easy, but also ultimately unilluminating, to contrast the existing defects of the civil justice system with a utopian alternative world of ADR or administrative law, where disputes are resolved with speed, minimum cost and perfect wisdom, with the parties' respect for themselves and each other fully intact. As the case studies of human rights and occupational health and safety illustrate, however, alternatives to civil justice may suffer from

¹ Guido Calabresi and Philip Bobbitt, *Tragic Choices* (New York: Norton, 1978).

many of the same ills of court-based processes (human rights) and despite best intentions, alternative instruments designed according to a co-operative or non-adversarial ideal may do little to alter a relationship, like that between workers and employers, that has deep-seated antagonistic or protagonistic characteristics.

2. RATIONALES FOR LEGAL ORDERING

(a) ECONOMIC RATIONALES

(i) Facilitating Exchanges

The economic analysis of legal rules and institutions takes as its beginning point the notion that, under conditions of scarcity, resources in society will be allocated to their highest valued uses through voluntary and informed exchanges between self-interested individuals. However, the very possibility of such exchanges occurring depends upon the existence of rules, norms, and institutions, if only to define and enforce property rights as well as to interpret and enforce bargains between private actors. Clearly, however, as the example of the *lex mercatoria* or customary law merchant suggests, the state need not be the source of all of the rules, norms, and institutions in question.

In considering the role of legal rules and institutions in facilitating voluntary and informed exchanges among rationally self-interested individuals, the following functions can be distinguished:

a. Reduction of the Transaction Costs of Bargaining

By provision of basic default rules for contractual exchanges and related institutional arrangements that facilitate the operation of the market (e.g. corporate law), it is possible to reduce the transaction costs entailed in exchanges to below what they would be if individuals had to specify through *ex ante* bargaining all of the norms, rules and terms that apply to the transaction. This rationale for legal rules and institutions points to a wide scope for individuals to contract out of the basic default rules where it is in their mutual interest to do so. It is important to emphasize, however, that not all such default rules emanate, or should emanate from the state—many are established by custom, practice, or explicit agreement within a particular industry or trade.

b. Interpretation and Rule Application

The provision of institutions for impartial interpretation and application of rules (what could be called in the most general sense adjudication) also serves to reduce transaction costs. First of all, it will often be enormously costly, even where the parties to a transaction draw up their own terms, to specify those terms in such detail that their application to any given situation or contingency will be self-evident. *Ex post* rule interpretation and application may, of course, occur through further interaction or bargaining between the parties themselves. Even where there is a mutual interest in coming to a cooperative solution, however, each party may have a quite divergent view of how the rules and terms apply to a given situation, thereby resulting in a new set of transaction costs as the parties attempt to resolve their differences. Nevertheless, in some contexts, rule interpretation or application may well be capable of being supplied by

the private sector—international commercial arbitration and the arbitral boards or tribunals that exist in particular trades or professions are examples of private provision of this function.²

c. Enforcement

Where voluntary and informed exchanges cannot be enforced by the coercive power of the state, numerous problems of opportunism exist, particularly in non-simultaneous exchanges, where, but for enforcement, the first mover would always bear the risk that, having obtained the benefit of the exchange, the other party will then defect without performing their end of the bargain.³ There is a similar problem in simultaneous exchanges as well, where the quality or nature of the good or service in question cannot be readily ascertained by inspection at the time of the exchange.

In a range of situations, however, state enforcement may not be the most important means of inducing compliance with bargains.⁴ Where, for example, the parties contemplate repeat dealings, the need to preserve a relationship into the future may be an important incentive for compliance. More generally, reputational effects will exert a powerful influence on behaviour in many instances—in a society or an industry where information about reputations circulates freely and rapidly, past non-compliance with bargains may result in exclusion from future transactions. The most obvious example is the credit rating which almost every economically active individual possesses in our society, a rating that is widely available to anyone contemplating future dealings with that individual.

(ii) Correcting Market Failures

A very significant range of government regulation and policy can be understood in terms of attempts to correct market failure. The most relevant kinds of market failure are as follows:

a. Imperfect Information

Almost all human choice occurs under conditions of imperfect information. Nevertheless, economic theory suggests that, in the absence of full information, parties may well enter into bargains which are welfare-reducing (for one or both of them) and which result in a misallocation of resources. There are a variety of reasons why markets themselves may not generate an adequate amount of information in many contexts. First of all, there is a range of circumstances where one party has superior information to the other, but a disincentive, or no incentive, to disclose it or indeed, an incentive to disclose inaccurate information. These cases of asymmetric information failure include instances of fraud and of non-intentional (negligent or non-wrongful) misrepresentation.⁵ Fraud is often addressed through criminal law sanctions

² Lisa Bernstein, "The New Law Merchant: Private Commercial Law in the United States (March 1995) University of Toronto, Faculty of Law, Law and Economics Workshop Series, WS 1994-95 - 9.

³ See M.J. Trebilcock, *The Limits of Freedom of Contract*, (Cambridge, Mass.: Harvard University Press, 1993), p.16.

⁴ See, generally, D. Charny, "Non-Legal Sanctions in Commercial Relationships" (1990) 104 Harvard Law Review 375.

⁵ See M.J. Trebilcock, *The Limits of Freedom of Contract op.cit.* ch. 5, "Asymmetric Information Imperfections".

as well as private law doctrine that allows a transaction to be voided. The other forms of asymmetrical information failure have often been approached through private law doctrine (mistake, negligent misrepresentation, breach of warranty). Alternatively, as will be discussed below, a wide range of public regulatory measures is also aimed at correcting, or preventing, these information failures.⁶

b. Negative and Positive Externalities

Bilateral exchanges may often have effects on third parties, which the parties to the exchange, concerned only with their own welfare, will not take into account in allocating resources. An obvious example of a negative externality is pollution. Coasian analysis⁷ suggests that externalities can be internalized through bargaining between all parties whose welfare is affected by the use of a particular resource. However, the transaction costs of such bargaining may be extremely high, in the first instance due to the frequent need to coordinate a large number of dispersed bargaining agents (e.g. victims of pollution), and also due to strategic behaviour in bargaining (e.g. hold-outs and free-riding).

c. Public Goods

A similar logic applies with respect to positive externalities, which are often termed "public goods." Ogus cites the frequently used examples of education and training: "Clearly the person who receives this commodity is the primary beneficiary and the price that she is willing to pay for it should, in theory at least, reflect that benefit, principally the increase to her earning capacity. But other members of society also gain from the provision of education and training. For example, there are assumed to be material gains to present and future generations from a better trained workforce, education may encourage socially responsible behaviour and political stability through a more informed electorate; . . ."⁸

d. Monopoly Power

Where one party to a bargain exercises monopoly power the other party may well agree to terms that are less favourable than those that could be obtained in a normal competitive market or at the limit be priced out of the market. Consumer welfare, therefore, may be improved by policies that limit monopolies or (where market structure itself appears to generate monopoly as the most efficient form of provision—the so-called "natural monopoly" case) regulation of the terms of bargains between monopolists and consumers. Monopoly power may also be a concern from the perspective of the non-economic concern of autonomy, where the existence of such power plausibly leads to the characterization of a transaction as "non-voluntary".⁹

⁶ See D. Dewees, F. Mathewson and M.J. Trebilcock, "Policy Alternatives in Quality Regulation", in D. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces and the Environment* (Toronto: Butterworths, 1983).

⁷ Ronald Coase, "The Problem of Social Cost", (1960) 3 J. of Law and Economics 1.

⁸ A. Ogus, *Regulation: Legal Form and Economic Theory*, (Oxford: Clarendon Press, 1994) pp. 34-35.

⁹ See M.J. Trebilcock, *The Limits of Freedom of Contract*, *op.cit.*, ch. 4, "Coercion".

e. "Irrational" or Self-Destructive Behaviour (Endogenous Preferences)

A fundamental assumption of the market model is that individuals act rationally to maximize behaviour according to revealed preferences. Certain pervasive forms of behaviour may put this assumption in question. First of all, cognitive psychologists have discovered certain persistent cognitive biases in the manner in which individuals respond to risk in their utility calculations. For instance, a tendency has been observed to overestimate remote but catastrophic risks and underestimate relatively familiar and frequent ones.¹⁰

A different and more problematic claim is that some preferences themselves are irrational or self-destructive, presumably in terms of some more general set of "meta-preferences". Sunstein refers, for instance, to endogenous preferences, as "preferences [that are] a function of, or endogenous to, legal rules, acts of consumption, or existing norms or practices."¹¹ Addiction is an obvious example—an *ex ante* pre-addiction estimate of the costs and benefits of long-term use of a substance such as tobacco or heroin would likely not result in a rational choice to consume. But initial consumption based upon short term costs and benefits leads to an addiction that results in a longer term pattern of behaviour that is welfare-reducing even in terms of the individual's own preferences *ex ante* the addiction.

A different problem may be evident in the case of a preference for racial discrimination. Such a preference may have been formed on the basis of irrationally held beliefs about particular racial groups. Yet another case is that of adaptive preferences: for instance, someone who has been sexually abused as a child may continue to "choose" destructive or abusive relationships throughout their life, or even a life of prostitution, because their understanding of the possibilities for fulfilment has adapted to the initial experience of abuse.

Even if people who have such endogenous preferences might have a greater chance of overall happiness without these preferences, state action that simply overrides the preferences themselves may actually make the individual worse off, as they can now not even satisfy the *endogenous* preferences (or more likely face even higher costs, such as the risk of legal sanction, in satisfying these preferences). Therefore those such as Sunstein and ourselves who are concerned with the problem that endogenous preferences pose for overall utility maximization are more likely to favour non- or minimally-coercive governmental responses, such as education, persuasion, provision of therapy, support groups, enhanced social and economic opportunities, etc. These issues will be discussed in greater detail in the next part of this paper on instrument choice.

(b) DISTRIBUTIVE JUSTICE

Distributive justice encompasses a wide variety of claims about the appropriate distribution of resources in society, some of which are complementary and others, contradictory. Most contemporary conceptions of distributive justice—at least those prevalent in liberal democratic

¹⁰ S. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Realities* (Cambridge: Harvard, 1993); A. Tversky and D. Kahneman, "Rational Choice and the Framing of Decisions", (1986) 59 *Journal of Business* 251; John Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989); John Elster, *Rational Choice* (Oxford: B. Blackwell, 1986); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990) at 44-5, 60-7.

¹¹ C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990), p. 64.

societies—situate themselves between two crucial moral insights. The first is that there is a range of morally arbitrary circumstances that should not determine the welfare or life-chances of individual members of society, for example sickness, injury from accident, the income of one's parents, and so forth. The second is that no one has an unlimited claim on the resources of any other member of society, particularly where such resources reflect compensation for that member's contribution to the general welfare. There is, of course, room for a great deal of argument about the justice of distributions that flow from morally arbitrary circumstances, and especially about the extent to which the individual themselves should be responsible for correcting or insuring against the effects of such morally arbitrary events. In most liberal democratic societies, for instance, publicly-funded or provided health care is regarded as a cornerstone of distributive justice, whereas in the United States it is not. Similarly, a degree of taxation for redistributive purposes is widely accepted as legitimate, with much debate about the point at which such taxation constitutes a form of exploitation or unjust appropriation of wealth.

There has been a pronounced tendency to attribute redistributive purposes to a wide range of laws and institutions in society, or (in some instances) explicitly impose such purposes on laws and institutions. For instance, tort law has often come to be seen as an instrument for spreading losses from morally arbitrary events, despite the claims of formalist legal scholars, such as Ernest Weinrib¹², that this distorts the internal structure of tort law, as well as the concerns of instrumentalist legal scholars that general social compensation schemes are more likely to realize distributive justice than an attempt by courts to bilaterally distribute losses as between an individual plaintiff and defendant.

At the same time, some regulatory schemes such as minimum wage laws and rent controls may be inaccurately characterized as based primarily on redistributive rationales, as may private law doctrines such as unconscionability. These instruments may, however, be primarily concerned with addressing the effects of inequalities of bargaining power on individual bilateral transactions, rather than the achievement of a broader vision of general social equality.

One prominent approach to distributive justice in contemporary liberal theory is that represented by Rawls' difference principle; a given policy, in order to be distributively just, must leave the least advantaged members of society better-off, or at least not worse-off.¹³ This criterion has the advantage of avoiding the radical social engineering implicit in the project of simply eliminating or erasing all the distributional impacts of morally arbitrary events or circumstances.

(c) AUTONOMY AND CORRECTIVE JUSTICE

From a Kantian perspective, a central rationale for the state is to provide for the co-existence of the freedom of each with the freedom of all, through coercive laws that prevent interference by individuals with the rights of other individuals to property and bodily integrity. These laws have a universal character, treating all individuals as juridical equals and ends in

¹² E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

¹³ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971). See generally, Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991), "Metaphysical First Principles of the Doctrine of Right".

themselves, who cannot be treated by others as mere means or instruments to their purposes and desires. On this view, breach of contract or tortious injury constitutes interference by one individual with the rights of another, creating an inequality in the relation between the doer of the wrong and the sufferer which is corrected or rectified by the doer returning to the sufferer the "value" of what has been taken, thereby re-establishing the initial equality between doer and sufferer. This initial equality, of course, is not defined in terms of equality of resources, status, etc. but the equal right to non-interference with one's person and property.¹⁴

This being said, background inequalities are not entirely irrelevant to this concept of autonomy. Where they result in a plausible characterization of an exchange as coercive or non-voluntary, a corrective justice theorist may view nullification or alteration of the terms of the exchange as required by the concept of autonomy. However, this is not for the sake of distributive justice, i.e. in order to remove the background inequalities themselves, but rather because they produce an inequality in the specific bilateral relationship between the parties.¹⁵

Of course there is room for a great deal of argument about whether, in a given situation, constraints on the choices of one of the parties should lead to a characterization of coercion¹⁶ Here, there is considerable room for debate about the use of minimum wage laws, rent control regimes, and even occupational health and safety laws to respond to inequalities of bargaining power.

Finally, a more expansive view of autonomy can provide a justification for policies that enhance individuals' concrete opportunities for self-development—for instance, education policies than ensure that, in their formative years, all individuals develop those cognitive and judgmental capacities required for autonomous choice. Again the extent to which autonomy or freedom can be defined coherently in purely negative terms—non-interference or non-coercion—and the extent to which it has a positive dimension that implies an entitlement to social resources continues to be controversial in most liberal democratic societies.

A further dimension is that of "equal recognition" or "equal concern and respect" to use the formulation of Ronald Dworkin.¹⁷ Here, at issue is not merely the right to non-interference or even to the social resources required for autonomy, but a right to be recognized as an equal in the sphere of civil society. This is among the most important rationales for human rights legislation that prohibits "private" or non-governmental discrimination with respect to provision of services, access to housing, employment, etc. Similarly, affirmative action legislation and pay equity legislation may be understood not only, or even primarily, as a correction or rectification of a past denial of civil and political rights but as a vehicle of universal equal recognition.

Where, however, the kind of recognition demanded is recognition not of the equal worth of the individual regardless of group identity or affiliation, but recognition of the group itself, serious tensions start to arise between the goal of equal treatment of individuals and the goal of

¹⁴ See E.J. Weinrib, *The Idea of Private Law*, *op. cit.*, chs. 3 and 4.

¹⁵ See P. Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory", (1989) 10 *Cardozo Law Review* 1077.

¹⁶ See M.J. Trebilcock, *The Limits of Freedom of Contract*, ch. 4, "Coercion."

¹⁷ R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

providing special recognition to groups: recent constitutional debates in Canada exemplify these kinds of tensions.¹⁸

(d) COMMUNITY

Many political and social theorists regard community as an end in itself, not merely as a vehicle for the realization of the shared aims and goals of individuals. This sentiment is neatly summarized in Michael Sandel's notion that, through community, we know a good together that we cannot know alone.¹⁹ We ourselves find explanations of community that rest on instrumentalist concepts such as that of social capital²⁰ or the idea of a social context for individual self-development²¹ more persuasive. This being said, communitarians are likely to prefer forms of state intervention that do not entail the parcelling out of individual entitlements or rights to be vindicated in adversarial settings. Where wrongful behaviour has occurred, the communitarian focus will more likely be on "healing" or social reintegration than on punishment or correction. Communitarianism often is invoked as a rationale for protecting the identity (cultural, linguistic, etc) of a particular community, or guaranteeing its economic survival in the presence of change. It is possible, however, to place a high value on the good of community without viewing this good as bound up with the survival of any particular community. On this perspective, we can afford to let individual communities die out as long as new ones come into existence in which communal values may be vindicated.

3. THE CHOICE OF GOVERNING INSTRUMENT AND THE CIVIL JUSTICE SYSTEM

We now proceed to consider kinds of alternative policy instruments available to vindicate the various rationales for government intervention described above, and the implications for civil justice.

(a) FACILITATION OF MARKET TRANSACTIONS THROUGH NORMS, ARBITRATION AND ENFORCEMENT

A vast range of exchanges occur between individuals who are strangers to one another and will remain so, who have had no prior dealings, and are unlikely to have any future dealings. In these circumstances, publicly provided norms, arbitration, and enforcement are likely to be indispensable in managing the transaction costs of exchanges. However, it is largely impossible for the government to anticipate *ex ante* where public provision of norms, arbitration, and enforcement are likely to be efficient in reducing transaction costs. This argues in favour of making resort to state provided norms, arbitration and enforcement (or one or more of the three) optional. That is, if the parties prefer to create or specify their own mechanisms, they should be able to opt out. A complete menu of options would allow, for

¹⁸ See, generally, R. Howse, "Post-Charlottetown Constitutionalism: A Review Article", University of Ottawa Law Review, Spring 1995.

¹⁹ M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

²⁰ Robert Putnam, *Making Democracy Work* (Princeton: Princeton University Press, 1993).

²¹ W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1988).

instance, the parties to resort to state-provided norms or rules but agree to submit disputes to private arbitration. Similarly, it may be efficient for the parties but create their own detailed contract and handle disputes through private arbitration, yet resort to the state as the enforcer. This would argue in favour of rules that allow for effective state enforcement of private arbitral awards, something that has only recently occurred even in the international arbitration context. Finally, the parties, as is often the case now, may resort both to some general state-provided norms as well as writing their own contract to govern other matters, but use state-provided adjudication and enforcement.

In order that the parties make efficient choices as between private and state-provided norms, arbitration, and enforcement, it is important that they be charged the full costs of state provision, rather than these costs (as is now the case) being partly subsidized from general taxation revenues. In the case of norms, there is a significant public good dimension that makes such cost attribution very difficult. Especially in the common law context, private law norms evolve through the resolution of individual disputes. A particular decided case may create a legal rule or clarify a norm in such a manner as to make it less costly for many other individuals to transact. In this sense, parties who opt for private arbitration could end up free riding on the norm generating and clarification functions of state-provided dispute settlement. This may qualify somewhat the rationale for charging the full costs of state-provided adjudication to users.

In addition to directly enforcing bargains through the courts (and ultimately bailiffs and police) the state may also act in such a way as to make non-legal sanctions more effective. Reputational effects can be enhanced through provision of information to consumers, for instance, on merchants who habitually violate contractual bargains. As well, in some situations, the state may reduce the transaction costs that arise from the problem of second party performance in non-simultaneous exchanges through providing a kind of insurance against second party default. Examples are to be found in the consumer travel industry in some jurisdictions, or government provision of letters of credit, through export development agencies, to guarantee import-export transactions. Of course, legal economists will want to ask why markets themselves do not provide an adequate supply of these kind of default insurance arrangements; ultimately government intervention of this nature may depend on a more explicit market failure rationale.

(b) MARKET FAILURE

(i) Imperfect Information

Ad hoc adjustment or nullification of individual transactions through the employment of private law doctrines such as mistake or material non-disclosure may prove to be a very cost-intensive way of addressing problems of asymmetrically imperfect information. An obvious alternative is regulation that requires information be disclosed or (in some cases, such as certain kinds of health risks) direct provision by the state of the information in question. For disclosure requirements to work, individual agents must, of course, have the analytical tools available to them to interpret the information in light of their particular utility functions, including risk preferences. In instances where informed individual judgment about risks is very costly, there may be some justification for prohibiting certain kinds of risk/return trade-offs or

banning certain kinds of transactions. As Sunstein suggests, "Some regulation of dangerous food and drugs, consumer products, and workplace risks can be understood in these terms."²²

Just as public regulation may be a response to the inadequacy or costliness of addressing problems of imperfect information through private law doctrine, private enforcement or self-enforcing instruments may be part of the response to the costs inherent in direct state monitoring and enforcement of regulatory requirements such as disclosure requirements. Some examples of at least partially self-enforcing instruments are: the right to refuse unsafe work (discussed in detail in the Employment Case Study); the right to repudiate a transaction where disclosure or other requirements have not been met; and cooling-off periods for door-to-door sales.

(ii) Externalities

On a Coasian analysis, the existence of negative externalities points, in the first instance, to the assignment of property rights and/or the crafting of liability rules in such a way as to minimize the transaction costs of arriving at an efficient outcome through bargaining. Where co-ordination problems or high risks of strategic behaviour nevertheless make the transaction costs of internalizing externalities through bargaining very large, government regulation may be an appropriate response. An apparently straightforward instrument for internalizing externalities through regulation would be a tax on pollution equivalent to the difference between the private cost to the polluter of polluting and the full social cost. Traditionally, however, much regulation that addresses externalities has taken the form of "command-and-control" specification of standards or norms that may result in a highly arbitrary set of trade offs between conflicting uses.

"Command-and-control" regulation is often faulted as well for entailing costly and often ineffective direct monitoring by the state of private activity. Some of the problems involved in direct monitoring may be obviated, however, by enlisting private agents, such as workers, competitors, or interest groups who have access to information about non-compliance with regulation, and providing them with an incentive to pursue complaints about non-compliance. Private rights of action for environmental harm may complement and supplement public enforcement of regulation. Inasmuch as this is the case, it is important to reconsider rules about standing, costs, etc. to ensure that these do not provide inordinate obstacles to such private enforcement. Whistleblower laws allow for insiders such as employees to collect a bounty where they make available to the authorities information on wrongdoing within their organization, and may entail the right to mount a kind of private prosecution with substantial rewards to the whistleblower where the action succeeds. Such instruments will likely be most effective where the ground rules of the civil justice system permit contingency fees, and where a claimant does not face the risk of having to pay substantial amounts in costs where she is unsuccessful.²³

²² *After the Rights Revolution*, *op.cit.* p. 53.

²³ R. Daniels and R. Howse, "Whistleblower Statutes: Analysis of a Compliance Strategy", paper presented at Industry Canada Conference on Corporate Governance, March 1995.

(iii) Monopoly

Structural monopolies engage competition (antitrust) policy in the case of inherently competitive markets and ongoing regulation in the case of natural monopolies where economies of scale imply that one firm can most efficiently service the entire market. In cases of situational (or opportunistic) monopolies, private law concepts of duress or inequality of bargaining power may provide appropriate purchase on contracts entailing extortionate terms.

(c) DISTRIBUTIVE JUSTICE

There are important arguments against attempting to vindicate distributive justice goals through the use of instruments that implicate the civil justice system. It is a notorious fact that the least advantaged in society have greatly reduced access to the system. Of course, where other rationales, such as autonomy or corrective justice, justify resort to the civil justice system, the appropriate response may be take positive measures to increase the access of the disadvantaged to the system, and minimize the extent to which social inequalities affect individual outcomes within the system. These kinds of measures are the subject of other work in this project²⁴. However, the point most germane to our own enterprise is that distributive justice considerations may point to a choice of instrument that minimizes reliance on the civil justice system, for instance compensation schemes for accidents, rather than tort liability.

At the same time, compensation schemes and government risk regulation (for instance, worker's compensation and occupational health and safety laws) may in some circumstances be subject to capture by powerful interests, particularly industry interests. This, as well as bureaucratic inertia or defensiveness, may undermine the achievement of distributive justice as well as other goals such as deterrence through such instruments. Therefore, it may nevertheless be desirable to maintain, even under a general compensation regime, a residual private right of action in tort as an option available to an injured party in addition to or as an alternative to compensation.

Some legal scholars have argued that private law litigation is an appropriate vehicle for addressing distributive concerns, most notably Anthony Kronman.²⁵ Kronman usefully points out that tax and transfer approaches also have their limits and imperfections as instruments of distributive justice, and that simplistic *a priori* judgments about the superiority of one distributive instrument over another are not warranted. It is, nevertheless, important to recognize that there are certain structural problems inherent in attempting to achieve distributive justice goals in the bipolar setting of civil litigation. Within this setting, the court can only redistribute wealth, as it were, between the plaintiff and the defendant. It cannot determine and assign overall social responsibility for a distributively just outcome. This leads to the possibility that, in order to address and rectify morally arbitrary inequality, the court will have no choice but to single out the other party before it as herself responsible for removing the inequality, and this itself may entail a significant element of moral arbitrariness. As one of us has noted elsewhere, "contract regulation, almost by definition, entails imposing disproportionate distributive burdens on some sub-set of society on the relatively fortuitous

²⁴ See the paper by Janet Mosher and Ian Morrison, *infra*.

²⁵ A. Kronman, *Contract Law and Distributive Justice*, (1980) 89 Yale Law Journal 472.

basis that they happen to be involved in exchange relationships with other members of society who engage our distributive concerns.”²⁶

(d) AUTONOMY AND CORRECTIVE JUSTICE

Corrective justice, by its very nature, appears to require a mechanism for adjusting the bipolar relationship between the doer and the sufferer of wrongdoing, through a direct transfer from the former to the latter. As Ernest Weinrib suggests, “...positive law supplies institutions that authoritatively and impartially elaborate the law and relate it to specific instances of interaction. In treating the parties as equals, corrective justice precludes either of them from unilaterally determining the legal consequences of their relationship. Corrective justice thereby requires that disputes be authoritatively resolvable by a third party. Positive law establishes the impartial and disinterested institution—in our culture, the judiciary—that can decide the controversies in a way that is publicly recognized as valid and authoritative.”²⁷

It is important to note that Weinrib identifies two fundamental characteristics of the kind of dispute settlement implicit in the concept of corrective justice, namely impartiality and disinterestedness, yet accepts that, in different social contexts, different kinds of institutions may satisfy this role. Whether a given institution can adequately embody these characteristics is an empirical issue.

Clearly, however, instruments like no-fault compensation schemes do not respond at all to the rationale of corrective justice since they abstract from the bipolar relationship of sufferer and wrongdoer. Corrective justice requires at least the possibility of vindicating one's rights as against the wrongdoer and therefore implies that, where compensation schemes are available, they nevertheless should leave the option open of a private right of action. By contrast, settlement of contractual disputes through Alternative Dispute Resolution would be consistent with a corrective justice rationale, provided that the institution in question assured disinterestedness and impartiality, and provided that it employed what Weinrib describes as the “ensemble of doctrines and procedures reflecting the structure of corrective justice”²⁸ in resolving the disputes.

A significant range of regulation, as well as contract law doctrine, as noted above, addresses situations where, because of inequality between the parties or the necessitousness of one of them, the terms of their bargain, if left unregulated, would lack the character of a voluntary exchange. Of course setting compulsory terms, such as minimum wages or minimum health and safety requirements, is an imperfect solution, since these terms would not necessarily reflect the outcome of a bargain between the parties that was, in the relevant sense, free. At the same time, the image of “the state” simply interfering with private bargains is too simplistic. For in a pluralistic liberal democracy, minimum wage laws, for example, are a product of social bargaining that takes into account a plurality of interests and perspectives. It becomes a contextual question whether autonomy in the relevant sense is maximized by private bargaining between individuals as economic actors or social bargaining between individuals as

²⁶ M.J. Trebilcock, *The Limits of Freedom of Contract*, *op.cit.* p. 100.

²⁷ E. Weinrib, *The Idea of Private Law*, *op. cit.*, p. 218. See also A. Kojève, *Esquisse d'une phénoménologie du droit* (Paris: Gallimard, 1981).

²⁸ E.J. Weinrib, *The Idea of Private Law*, *op.cit.*, p. 218.

citizens, i.e. is the balance of private power between the parties more likely to preserve the autonomy of each, or is the balance of social power in the political marketplace more likely to do so?

What seems least justifiable from an autonomy perspective is *ad hoc* interference by courts with private bargains on the basis of open-ended doctrines or of very general statutory criteria concerning fairness or protection of weaker parties. The Court ends up substituting its own intuitions for an albeit arguably unfree private bargain, whereas detailed public regulation may at least reflect a social bargain between citizens under conditions of political freedom and democracy, and is therefore not simply paternalistic but a product of the exercise of autonomy in the public sphere.

Finally, where what is at stake is law, such as human rights law, that is in part justified as a means of universalizing the recognition of the equal worth and dignity of individuals as autonomous beings or ends in themselves, dispute resolution approaches should reflect this goal. The rapid settlement of large numbers of claims on a compensation basis by human rights officials may achieve little in terms of furthering the goal of recognition. An adversarial setting where the victim can assert her rights against the individual who has refused to recognize her equal worth and dignity and receive public vindication may be more appropriate.

(e) COMMUNITY

Communitarians, such as Charles Taylor, Mary Ann Glendon, and Michael Sandel²⁹, often criticize what they see as the increasing “rights” orientation of contemporary liberal democratic societies. From this perspective, instruments that address various normative claims to legal or regulatory action should minimize the extent to which individual members of society are set against one another with competing sets of rights or entitlements to be vindicated in formal, impersonal, or adversarial settings. Communitarians tend to idealize informal community, familial or personal settings for resolving conflict as if these alternative settings provided a kind of spontaneous healing of differences or a seamless web of social harmony. However, an examination of how these “natural” communities have traditionally resolved conflicts may reveal that the alternative to impersonal rights has been ordering by authoritative hierarchy, violence or the threat of violence, or emotional blackmail.

One often hears the existing civil justice system pejoratively characterized by communitarians as “adversarial”, as if the justice system itself were responsible for creating the differences of interest or perspective that exist between the parties. However, the existing justice system ensures (perhaps unintentionally) that matters will only be resolved through the judicial process where differences are very serious, due to the high costs of this avenue of redress. Indeed the real cause for worry is that too many matters are settled in an informal, or supposedly conciliatory, fashion because one of the parties is unable to bear the costs and risks of refusing to settle.³⁰

²⁹ Charles Taylor, *Philosophical Papers, Vol. 2: Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

³⁰ See O. Fiss, “A Solution in Search of a Problem”, in Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice: A Study Paper by Roderick A. Macdonald with Commentaries by H.W. Arthurs et al.* (Toronto: Ontario Law Reform Commission, 1995).

This being said, there is a legitimate communitarian rationale for structuring regulation, or taking additional measures, so as to avoid disputes or conflicts arising in the first place. In the landlord/tenant context there is a likelihood that many disputes could be avoided if both parties could come to a clearer understanding at the outset of their relationship as to nature of their respective rights and duties. Even requiring for any tenancy, whether with a written lease or not, that both the landlord and tenant go over together a list of their rights and obligations *vis a vis* one another pursuant both to residential tenancies legislation and to common law, and sign a document stating that these have been reviewed might obviate many disputes. Another means of avoiding disputes, or at least preventing disagreements from escalating to a level of acrimony or distrust that makes adversarial resolution almost inevitable, is to encourage or require the creation of internal mechanisms or institutions for on-going dialogue, discussion and exchange of information between the parties. An example in the labour relations context is the creation of workplace Occupational Health and Safety Committees made up of both worker and management representatives. Similarly, in the case of a major building project that is likely to have environmental consequences, the striking of a standing committee of worker, owner, community, government and interest group representatives could be mandated by legislation. The purpose of such a committee would not be to substitute for formal legal rights or entitlements but to build a degree of trust and transparency with respect to the expectations and demands of each constituency.

More generally, where a new regulatory scheme is being introduced in a socially controversial area, for instance employment equity or pay equity, lack of clarity about rights and obligations may well augment social tension and generate a relatively large number of disputes. Here, as well, it is important to build into the scheme the requirement of on-going dialogue between constituencies. Significant information and education efforts to communicate the nature of rights and obligations is particularly important, since polarized political and social debate that may have surrounded the adoption of the scheme may well have led to exaggerated negative—and or positive—expectations by different constituencies as to the meaning of the change.

4. CASE STUDIES IN THE CHOICE OF GOVERNING INSTRUMENT

(a) MEDICAL MISADVENTURE³¹

The choice and design of appropriate policy responses to the problem of medical misadventure well exemplifies the range of considerations that have been reviewed in this paper that are relevant in shaping instrument choices. For victims or potential victims of medical misadventure, two issues will be of central importance: first, how to prevent, or reduce the incidence, of medical misadventure; second, to the extent that prevention efforts cannot realistically aspire to reducing the incidence to zero, whether and how victims of residual cases of medical misadventure should be compensated.

Medical, or iatrogenic, injury is not a trivial phenomenon. Two substantial independent studies of hospital records in the U.S. - one undertaken in California in the mid-1970s and a recent very large-scale Harvard Medical Practice study of New York hospitals - yield similar

³¹ Much of the material reviewed in this case-study is discussed at greater length in Don Dewees, David Duff, and Michael Trebilcock, *Exploring The Domain of Accident Law: Taking the Facts Seriously* (N.Y.: Oxford University Press, 1995), chap.3.

findings, indicating that approximately 4 percent of all hospitalizations result in adverse events from medical treatment and one-quarter of these incidence involve sub-standard care.³² In other words, negligent adverse events were found to occur in one percent of all discharges.³³ The Harvard Study concluded that in New York State in 1984 nearly 99,000 patients suffered disabling injuries, of which more than 13,000 resulted in premature death.³⁴ Extrapolated to the U.S. population as a whole, this suggests that of 14 million patients hospitalized every year, 1.5 million suffer some kind of disabling injury, that 180,000 of these patients die prematurely as a result of medical treatment, and that over half of these death are due to negligence.³⁵ The number of deaths from medical injury thus appears to exceed mortalities associated with both motor vehicle accidents (about 40,000 per year in the U.S.) and work place accidents (about 6,000 per year in the U.S.).³⁶ We are not aware of any comparable Canadian data, but it seems to us unlikely that the Canadian experience would be sharply different.

Against this backdrop, medical malpractice actions have escalated dramatically in recent years. In the U.S., the number of claims filed per 100 physicians increased from about 4.5 in 1980 to 17.8 in 1985, declining to about 13 in 1990. Between 1980 and 1985, the average value (in 1990 U.S. dollars) of paid malpractice claims in the U.S. tripled from \$37,000 to \$110,000. The average real (1990 U.S. dollars) cost of basic malpractice coverage for U.S. physicians also tripled, from \$6,350 in 1974 to about \$17,000 in 1988.³⁷ Similar trends occurred in Canada during this period, though at significantly lower absolute levels. Between 1971 and 1990, the number of claims filed per 100 Canadian physicians increased from 0.55 to 1.7, while the average value of paid claims (1990 U.S. dollars) soared from \$25,700 to \$145,700. From 1976 to 1990, the average (1990 U.S. dollars) cost of basic malpractice coverage for Canadian physicians increased from about \$400 to roughly \$2,100.³⁸ A very high percentage of claims filed settle before trial, but the small number that proceed to trial typically entail complex and lengthy hearings. Despite this increase in malpractice claims, the recent Harvard Medical Practice Study of New York hospitals found that 7 to 8 times as many patients suffered an injury from negligence as filed a malpractice claim, and about 16 times as many patients suffered an injury from negligence as received compensation from the tort

³² Mills, D.H., "Medical Insurance Feasibility Study—A Technical Survey" (1978) 128 West. J. Med. 360 at 362-63; Harvard Medical Practice Study Group, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (Harvard Medical Practice Study, 1990) [Harvard Study]. Adverse events were classified as negligent if caused by a failure to meet standards reasonably expected of the average doctor.

³³ "Harvard Study Finds Much Medical Negligence but Few Suits Filed" (1990) 26 Trial 16 at 16-17.

³⁴ Harvard Study, *op. cit.*

³⁵ Brennan, T.A., "An Empirical Analysis of Accidents and Accident Law: The Case of Medical Malpractice Law" (1992) 36 St. Louis U.L.J. 823 at 831.

³⁶ *Ibid.*

³⁷ Dewees, D., et. al., "The Medical Malpractice Crisis: A Comparative Empirical Perspective" (1991) 541 Law and Contemporary Problems 217 at 219-21.

³⁸ *Ibid.*

system.³⁹ The question posed by these data is whether the court-based tort system well serves either the prevention or compensation goals identified above.

The adverse consequences of medical misadventure take other forms besides the conventional categories of medical malpractice. The contraction of the HIV virus through transfusions of contaminated blood or blood products has recently been a matter of acute public concern in Canada and many other countries. By 1989, it was estimated that of the 2,500 haemophiliacs in Canada, 50 percent had contracted the HIV virus from the blood distribution system.⁴⁰ In Ontario, as of April 1993, over 60 tort claims had been filed by victims of HIV infected blood (most of which are likely to be settled pursuant to a federal-provincial administrative compensation scheme). In the U.S., as of April 1991, there were about 300 tort claims against blood banks involving AIDS⁴¹. According to the Interim Report of the Krever Commission of Inquiry on the Blood System in Canada, the possibility that a range of infectious agents may be transmitted through the blood system to unsuspecting blood product users is ineradicable.⁴² This view is brought home by a looming crisis over victims of hepatitis C (HCV). It is estimated conservatively that there are currently 100,000 people in Canada infected with HCV from all sources. The number of people who may have been infected with HCV through the blood system through 1986 to mid-1990 when screening began could be as high as 28,000.

Another class of medical misfortune involves adverse consequences of pharmaceuticals, such as the Thalidomide tragedy in the 1970s, the DES litigation in the U.S. over an anti-miscarriage drug that caused vaginal cancer in the children of the DES mothers; and current litigation over breast-implant substances that have led the leading manufacturer, Dow-Corning, recently to file for protection under Chapter 11 of the U.S. *Bankruptcy Act*. A variant on these cases involves adverse reactions to vaccines, often administered pursuant to publicly sponsored inoculation programmes, such as exemplified in the well-known *LaPierre* case decided by the Supreme Court of Canada in 1985.⁴³

Legal doctrine covering this range of cases is, ostensibly, reasonably straightforward. In medical malpractice cases, liability requires proof of negligence. In most provinces of Canada, this is also true of most cases involving contaminated blood and adverse consequences of pharmaceuticals or vaccines. In the U.S. and more recently the European Union, in cases of

³⁹ Harvard Study, *op. cit.* at 6; P. Weiler, *Medical Malpractice on Trial* (Cambridge: Harvard University Press, 1991) at 13.

⁴⁰ J.J.M. Shore and M. Vardy, "The Government's Duty to Provide Financial Assistance to Persons Infected with HIV Through Blood Transfusions and Blood Products" (1990) *Health Law in Canada* 183 at 183; See also Health Canada, Laboratory Centre for Disease Control, *Report on the Epidemiology of Transfusion-Associated HIV Infection in Canada, 1978-1985* (Ottawa: Ministry of Supply and Services, 1994).

⁴¹ See R. K. Jenner, "Transfusion-Associated AIDS Cases" (1990) 26 *Trial* 30; V. Slind-Flor, "Suing Blood Banks" (1991) 13 *National Law Journal* 35.

⁴² Krever Commission, *Interim Report on the Blood System in Canada*, Ministry of Supply and Services, February 1995, at 17-34; see also S. Rogers, "The Canadian Blood Delivery System: Liability for Blood Related Injuries" (1989) 21 *Ottawa Law Review* 311 at 323.

⁴³ *Jacques Lapierre v. Attorney General of the Province of Quebec*, [1985] 1 S.C.R. 241.

product-related accidents (of which blood, blood products, pharmaceuticals, and vaccines are examples), the general product liability regime is one of strict liability requiring only proof that the product is "defective" in design, construction, or in terms of adequacy of warnings, but not proof of negligence in any of these respects. However, most U.S. states have passed legislation ("blood shield laws") deeming blood transfusions to entail a service rather than a product, and thus to require proof of negligence on the part of the supplier in order to attract liability for adverse consequences. Even where a strict product liability regime applies, some cases in the above categories are likely to present significant difficulties - for example, whether a vaccine or pharmaceutical that is perfectly safe for use by most consumers but causes adverse and unavoidable reactions amongst a small sub-set of users should be viewed as "defective".

This range of cases involving different forms of medical misadventure raise opposing but inter-related issues with respect to the compensation objective. Clearly, for many of these cases, there is little or no prospect of recovery through the tort system, simply because negligence cannot be proved, and thus any claim for compensation is likely to go unvindicated. In other cases, such as medical malpractice cases, where negligence might in theory be proved, the evidence suggests that many meritorious claims are not brought; those that are brought result, on average, in grossly inadequate compensation for economic losses (even disregarding non-pecuniary losses); cases entail delays on average of four years in both the U.S. and Canada from filing to resolution; and when trials are entailed, involve very large legal and expert witness expenses and protracted court hearings.

With respect to the prevention objective, the question that must be asked is whether the prospect of tort liability, despite its delays, costs (private and public), and other inefficiencies, nevertheless serves an important deterrent function. With respect to a large range of the cases described above, even in principle a negligence action is unlikely to be sustainable (e.g. many contaminated blood, pharmaceutical, and vaccine cases, as well as adverse outcomes from other forms of medical interventions) which suggests minimal deterrent effects. In some cases, the uncertainties of the tort system are claimed to discourage beneficial forms of product innovation, such as the development of new vaccines.⁴⁴ In other cases, the threat of tort liability is often claimed to induce socially wasteful forms of defensive medicine.⁴⁵

In short, the empirical evidence strongly suggests that the tort system is hopelessly inadequate as an instrument for realizing compensation goals, and while empirical evidence in the U.S. appears to suggest that it does deter some potential incidents of medical malpractice⁴⁶, it simultaneously induces socially wasteful defensive behaviour by physicians and leaves many other cases of sub-standard conduct or excessively risky activities unaddressed. However, despite this gloomy conclusion, the hard question must be asked: compared to what? That is to say, the tort system can only be judged a failure in these respects relative to some other realistically attainable set of institutional alternatives. Do such alternatives exist?

⁴⁴ L. Lasagna, "The Chilling Effect of Product Liability on New Drug Development" in P.W. Huber & R.E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington, D.C.: The Brookings Institute, 1991) 334.

⁴⁵ E.g. R.A. Reynolds, et. al., "The Cost of Medical Professional Liability" (1987) 258 J.A.M.A. 936.

⁴⁶ P. Weiler et al. *A Measure of Malpractice* (Cambridge, Mass: Harvard University Press, 1993) at 111-134.

(i) Distributive Justice: the Compensation Goal

Across the spectrum of cases of medical misadventure described above, a number of jurisdictions have introduced more or less finely targeted administrative no-fault compensation schemes. Sweden and Japan have adopted no-fault compensation schemes which cover pharmaceutical injuries generally. The Swedish scheme, which is more broadly cast than the Japanese scheme, generated 1,695 claims in the initial period July 1, 1978 to June 30, 1986, of which just over 400 were compensated.⁴⁷ As of 1990 the average payout was \$12,000.⁴⁸ The 1986 premium for Swedish pharmaceutical insurance, entailing industry levies, was \$2.4 US million corresponding to about 0.4 percent of the industry's total business volume in Sweden.⁴⁹ A number of jurisdictions have introduced administrative no-fault compensation schemes specifically for vaccine injuries, including the Province of Quebec, the U.S., Denmark, France, Switzerland, and the UK. The number of claims initiated and claims approved under these schemes has been very low. For example, as of September 13, 1994, the Quebec Vaccine Compensation Scheme had awarded payments to 13 individuals whose injuries had developed since June 20, 1985.⁵⁰ With respect to compensation of individuals who contracted the HIV virus from the blood distribution system, a number of jurisdictions, including Canada, the UK, New Zealand, Germany, Norway, Denmark, Sweden, France, Switzerland, Australia, Spain, and the Netherlands, have adopted highly targeted administrative no-fault compensation schemes. In the case of more conventional forms of medical malpractice, both Sweden and New Zealand have adopted forms of administrative no-fault compensation schemes - in New Zealand's case as part of a broader accident compensation scheme, and in Sweden's case as an administrative variant on the tort system where designated compensable event (DCE) schedules have been developed that govern when a patient may recover from a doctor or health care institution for "avoidable" adverse medical consequences. In both cases, the percentage of victims of medical misadventure who have successfully claimed compensation has increased substantially over the percentage obtaining compensation under the traditional tort system, while premium costs have remained quite modest.⁵¹

In Canada, Professor J. Robert S. Prichard in a 1990 study for the Conference of Deputy Ministers of Health, *Liability and Compensation in Health Care*,⁵² recommended that Canadian governments take steps to institute a broad-based no-fault health care related injury

⁴⁷ C. Oldertz, "Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden" (1986) 34 *American Journal of Comparative Law* 635 at 654.

⁴⁸ G.C. Jackson, "Pharmaceutical Product Liability may be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation" (1992) 42 *The American University Law Review* 199 at 228.

⁴⁹ Oldertz, *op. cit.* at 654.

⁵⁰ L.-G. Cloutier, Le Directeur de la Protection de la santé publique, *Programme d'indemnisation des victimes d'immunisation au Québec* (September 13, 1994).

⁵¹ Donald Dewees, David Duff, and Michael Trebilcock, *et. al.*, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (New York: Oxford U P, [forthcoming 1995]) at ch.3.VI.C.

⁵² J.R.S. Prichard, *Liability and Compensation in Health Care* (1990) *A Report to the Conference of Deputy Ministers of Health of the Federal/ Provincial/ Territorial Review on Liability and Compensation Issues in Health Care* [The Prichard Report].

compensation scheme, and that injured patients should be able to elect between it and tort recovery.

In the U.S., the Harvard Medical Practice Study Group estimated that the total cost of benefits under a comprehensive no-fault compensation scheme in the State of New York, with a six-month deductible and compensation only for net economic losses, after deducting available benefits from collateral sources, would have been around \$900 million in 1984, which compares favourably to the roughly \$1 billion in malpractice premiums paid in the state in 1988⁵³, given the much larger proportion of victims who would receive benefits.

We believe that it is time to take seriously the possibility of moving to a form of administrative no-fault compensation for victims of medical misadventure. As has been evident from the recent experience in Ontario with the adoption in 1990 of a form of automobile no-fault compensation system, where the number of claims filed in the court system has declined dramatically (from about 20% of all civil claims filed and tried each year on average in Toronto between 1973/74 and 1988/89 to about 5% of all civil claims filed in Toronto in 1993/94), this would at once reduce the burden on the court system and provide compensation to a much broader class of victims, at lower administrative costs, and in a more timely and humane way. The impact on the court system will, of course, be much less dramatic than in the case of automobile accidents - medical malpractice claims comprised only about 1.2% of all civil claims filed each year on average in Toronto between 1973/74 and 1993/94 and represented about 1.7% of trial cases.⁵⁴ Nevertheless, a no-fault medical compensation scheme is likely to respond more successfully to the distributive justice rationale developed in the framework section of this paper than is the existing tort system.

However, as recent experience under the Ontario automobile compensation scheme also reveals, where premiums have increased sharply, the design of a no-fault compensation scheme requires careful attention if abuses are to be prevented and costs contained. In our view, some of the key principles to be observed in designing such a scheme are the following: First, the scheme should compensate only economic losses (up to a relatively high percentage e.g. 80 or 90% of after-tax earnings), but there should be no compensation for non-pecuniary losses, which often amount to in excess of 50% of most tort awards for personal injuries. Secondly, compensation should be directed to victims suffering serious injuries e.g. total or partial permanent disability, which requires that there be some form of deductible either in terms of a monetary or verbal threshold of losses ("e.g. serious and permanent injury"), or time deductible as under the Harvard scheme (perhaps reduced to two months), in order to screen out a multitude of smaller claims. Third, benefits payable under such a scheme should be subject to collateral source offsets in order to avoid wasteful and costly over or duplicative insurance.

(ii) Corrective Justice

While the logic of successfully and cost-effectively implementing a compensation scheme responsive to distributive justice concerns points to the preclusion of access to the tort system, completely precluding such access would appear to defeat entirely corrective justice as a

⁵³ Harvard Study, *op. cit.*, at 9.

⁵⁴ See John Twohig *et al.*, "Empirical Analysis of Civil Cases Commenced and Cases Tried in Toronto 1973-1994", *infra*.

relevant public value in the medical misadventure context. In cases of egregious misconduct attributable to recklessness of specific individuals, a denial of corrective justice through the tort system would threaten to diminish the autonomy of the victims, depriving them of the possibility of vindicating their rights to bodily integrity. In such a context, we do not think that responding to the distributive justice rationale for compensation can rightly entail the denial of corrective justice altogether. Consequently, we would recommend maintaining a right of action in tort, but with a higher threshold than that entailed in the current negligence standard for tort liability (which standard has been influenced by judicial concern for distributive justice, a concern which would of course now be vindicated through a compensation scheme). This might be expressed as a requirement that the plaintiff be able to show gross, reckless or wanton misconduct causing serious injury. In such cases, full tort damages would be recoverable, subject to the plaintiff reimbursing the insurer for any no-fault benefits received.

(iii) Internalizing Risks and Discouraging Inefficiently Risky Conduct

Where a compensation scheme is funded from general taxation revenues, it has the disadvantage, from the point of view of the externalities rationale discussed in the framework section of this paper, that (unlike in the case of the tort system and the private third-party insurance arrangements premised upon tort liability) no direct incentive is placed on medical providers to take efficient precautions to avoid misadventure. Thus, to the greatest extent feasible, the scheme should be financed through levies on differentiated classes of actors and individual actors engaged in injury-producing activities. In the absence of some serious attempt at experience or risk rating, whatever incentive or deterrent effects the tort system presently engenders are likely to be lost altogether. However, while fault is not a central issue under no-fault systems, issues of causation can still be highly problematic, making the attribution of losses to particular sources difficult. For example, is a doctor or hospital to be held responsible for properly deciding to amputate the gangrenous leg of an individual who developed this condition prior to admission to hospital? This suggests that in order to conserve on administrative costs there is a need to assign a central role to developing Designated Compensable Event schedules that operate as proxies for underlying causal relationships.

Some agency also needs to be designated or instituted to administer a no-fault medical misfortune compensation scheme and to provide for resolution of disputes arising thereunder. By implication, we reject a role for the courts in this respect, given our desire to avoid fact-intensive, adversarial determinations on a case-by-case basis. Such a scheme could be appended to an existing compensation bureaucracy, such as a Workers' Compensation Board, or a new administrative structure such as that created under the Ontario Automobile No-Fault Compensation scheme might be envisaged. Thus, we acknowledge that by taking the courts largely out of the equation, we do not eliminate by any means a role for the state, or a state agency, in overseeing such a scheme. However, the empirical evidence suggests that the private and public costs engendered by the court system consume somewhere between 55 and 60% of premium dollars in the medical malpractice field,⁵⁵ compared to administrative costs in

⁵⁵ Weiler, *A Measure of Malpractice*, *op. cit.*, at 53.

the range of 10-15% for existing no-fault compensation schemes.⁵⁶ With a well-designed scheme, there is the potential for major savings in both private and public transaction and administrative costs.

It should be noted here that the principal non-tort method of ensuring competence in the provision of medical services has been through licensing.⁵⁷ In the medical field, individuals are licensed both to practice medicine and to exercise hospital privileges. However, disciplinary action is not generally related to competence, but to other aspects of professional ethics. Most disciplinary actions involve drug related offenses, criminal charges, sexual impropriety, or abetting unlicensed persons to practice medicine.⁵⁸ Given the weak record of self-regulating licensure bodies in controlling post-entry competence, obviously a major concern with abandoning the tort system for medical malpractice and substituting some form of administrative no-fault compensation system is that there may be very few quality control or deterrence incentives left in the system. This concern has led to proposals for enhancing the effectiveness of regulatory controls over post-entry competence. First, it has been argued that because the sanctions available to licensing authorities have traditionally been limited and blunt - typically either license revocation or suspension - regulators have often been reluctant to impose severe penalties where a physician's behaviour was not egregious. Thus, the availability of a broader range of sanctions with a more corrective or rehabilitative orientation is widely advocated. Secondly, in order to mitigate tendencies on the part of self-regulatory bodies "to look after their own" (except in cases of egregious misconduct), proposals are often advanced for the inclusion of more lay people on professional governing bodies and their disciplinary committees, representing organized constituencies of relevant stakeholders, including consumers, who can hold their representatives accountable for the performance of their representational functions. A third proposal that has often been advanced (and in a number of jurisdictions implemented) in recent years has been the imposition of continuing medical education (CME) requirements as a condition of license retention. However, a number of studies of the efficacy of CME find little or no effect on practice conduct or on quality of patient care.⁵⁹ The evidence suggests that the only demonstrably reliable way to monitor continuing competence and remedy deficiencies is through the use of output monitoring and corresponding deficiency-oriented training.⁶⁰ To this end, the emergence of Quality Assurance Programmes, often promoted by third party insurers, which focus on regulation of specific practices to ensure individual compliance with predetermined standards seem more effective in

⁵⁶ D.B. Hodge, "No-Fault in New Zealand: It Works" (1983) 50 *Ins. Counsel J.* 22 at 230; J. Hellner, "Sweden" in E. Deutch and H.L. Schreiber, eds., *Medical Responsibility in Western Europe: Research Study of the European Science Foundation* (New York: Springer-Verlag, 1985).

⁵⁷ See Dewees, Duff and Trebilcock, *op.cit.*, at 122-135.

⁵⁸ S. Law & S. Polan, *Pain and Profit: The Politics of Malpractice* (New York: Harper & Row, 1978) at 33.

⁵⁹ R.H. Brook, *et al.*, "The Relationship Between Medical Malpractice and Quality of Care" (1975) *Duke L.J.* 1197 at 1226; G.L. Gaumer, "Regulating Health Professionals: A Review of the Empirical Literature" (1984) 62 *Mil. Mem. F.Q.* 380 at 399-400; D.A. Davis, *et al.*, "Attempting to Ensure Physician Competence" (1990) 263 *J.A.M.A.* 2041 at 2041.

⁶⁰ Dewees, Duff and Trebilcock, *op.cit.* at 127.

reducing substandard care.⁶¹ Identification of physicians falling below acceptable minimum standards requires reliance on systems of peer review, practice audits, utilization reviews, tissue and death reviews, and incident reports; remedial measures involve education targeted to specifically identified problems.⁶²

The issue of institutional responsibility for the quality of services provided in an institution's facilities is of central importance, because of the centrality of hospital-based incidents in the medical malpractice data. In Canada and many jurisdictions in the U.S., the legal system has taken an extremely permissive view of the responsibility of health care institutions for the quality of care delivered in its institutions, principally by declining to hold hospitals vicariously liable for negligent provision of medical services by physicians who hold hospital privileges in the institution but are independent contractors and not salaried employees of the hospital. Proposals have been advanced both in Canada and the U.S. for expanding the domain of institutional liability in tort law to embrace the quality of all services provided by health care personnel in an institutional setting, whatever their legal relationship with the institution.⁶³ These proposals are motivated by the view that health care institutions are often well placed to adopt systemic quality control policies that are likely to be more effective than policies targeted at individual practitioners, and therefore require enhanced incentives to adopt this more pro-active quality control orientation. Even if malpractice claims were largely removed from the tort system and handled through an administrative no-fault compensation system (as we suggest), these incentives could still be largely realized by imposing insurance obligations (and correlative financial contribution obligations) on health care institutions with respect to all sub-standard medical services provided within their facilities.

With respect to the other classes of medical misadventure described earlier in this case study (i.e. adverse effects of pharmaceuticals, vaccines, and blood and blood products) in all cases these products are subject to regulation by the Health Protection Branch of Health Canada, which in the case of new drugs and vaccines, imposes elaborate pre-approval testing requirements. In the case of blood and blood products, regulatory responsibilities have been diffused across the Health Protection Branch, the Canadian Red Cross, and the Canadian Blood Agency (members of which are the Ministers of Health for the provinces and territories), which funds the Canadian Red Cross Society's Blood Services operation. Acute public concerns over the functioning of the Canadian blood system, in light of the HIV infected blood tragedy, has prompted the appointment of a Royal Commission into the Canadian blood system (the Krever Commission), which after extensive public hearings recently released an Interim Report containing a number of recommendations for improved quality control in the system.⁶⁴

⁶¹ A. Donabedian, "Evaluating the Quality of Medical Care" (1966) 44 *Milbank Mem. Fund. A.* 166.

⁶² M.R. Chassin & S.M. McCue, "A Randomized Trial of Medical Quality Assurance: Improving Physicians' Use of Pelvimetry" (1986) 256 *J.A.M.A.* 1012.

⁶³ Weiler, *A Measure of Malpractice*, *op.cit.*, at 144-149; B. Chapman, "Controlling the Costs of Malpractice: An Argument for Strict Hospital Liability" (1990) 28 *Osgoode Hall Law Journal* 523.

⁶⁴ Krever Commission, *op. cit.*

(iv) Conclusion

We conclude from the empirical evidence that a well-designed administrative no-fault compensation scheme for medical misadventure is likely to achieve distributive justice objectives much more effectively than the tort system. Corrective justice values can still be vindicated to some extent by preserving tort claims in cases of egregious wrongdoing causing serious injury. Given the serious information asymmetries that afflict consumers in the medical services market, public policies must train a sharp focus on reducing the incidence of substandard medical care. The current tort system seems to serve this deterrent function poorly. However, complete abandonment of the tort system may significantly undermine whichever desirable deterrent effects it currently engenders. Thus, preservation of tort entitlements in a limited set of cases for corrective justice, deterrence, and public accountability ("tort law as ombudsman")⁶⁵ reasons, together with extensive risk or experience rating of no-fault compensation premia or levies, are important responses to this concern. In addition, regulatory reforms to medical licensure regimes and product and blood system quality regimes need to be assigned a higher priority if a less central quality control role is to be assigned to the tort system. Otherwise we risk committing ourselves to the untenable proposition that compensating for medical misfortunes is better than preventing them.

(b) CONSTRUCTION LIENS

(i) Introduction

Construction lien legislation in Ontario dates back to 1873⁶⁶. In its 110 year history, the *Mechanics Lien Act* was subject to major amendments almost every decade. The enactment of the *Construction Lien Act* 1983 entailed the most fundamental statutory overhaul of this body of law in its history, entailing a complete revision and restatement of the law. Construction lien statutes exist in every other province of Canada and in every state of the U.S. dating back to the enactment of mechanics lien legislation by the state of Maryland in 1791, at the recommendation of Thomas Jefferson and James Madison (amongst others).⁶⁷ All Australian states and New Zealand also have construction liens statutes, although notably the United Kingdom does not. In Ontario and elsewhere, this legislation has been productive, over the decades of large volumes of litigation, frequent review by law reform commissions and like bodies, and frequent amendments. The enactment of the new *Construction Lien Act* of Ontario in 1983 appears not to have dramatically changed these trends. Indeed, almost as soon as it was enacted, amending legislation was introduced to address various unanticipated affects of the new statute. Construction lien actions in all Ontario courts have escalated sharply in recent years rising from 2,513 in 1983/84 to 5,286 in 1991/92 before falling to 3,946 in 1993/94 and 3,560 in 1994/95.⁶⁸ In a submission in 1994 by the Construction Law Section of the Canadian

⁶⁵ See A.M. Linden, "Tort Law as Ombudsman", (1973) 51 Canadian Bar Review 155.

⁶⁶ See Kevin McGuinness, *Construction Lien Remedies in Ontario* (Toronto: Carswell, 1983), Preface.

⁶⁷ McGuinness, *op.cit.* at 6 & 16.

⁶⁸ See Twohig, *op.cit.*

Bar Association (Ontario) to the Civil Justice Review,⁶⁹ the CBAO stated that the litigation of construction cases is, generally, in a serious state of disarray, and is on the verge of a fundamental crisis in Metropolitan Toronto. While according to the Attorney General's Advisory Committee on Alternative Resolution of Construction Disputes⁷⁰, fewer than 5 percent of construction related actions commenced go to trial, many settlements take place after most of the costs, and many of the adverse effects, have occurred. The looming crisis to which the CBAO refers entails increasing delays in the adjudication of contested cases, and the large costs entailed in legal proceedings. An example prepared by the Attorney General's Advisory Committee indicates that for a complex \$100,000 construction claim that goes to trial, legal costs for the client may run as high as \$140,000 and as high as \$210,000 if the opportunity costs of the client's time are included.⁷¹

Without seeking to minimize these concerns over delay and costs, the very large number of construction claims filed in the Ontario civil court system in recent years requires cautious interpretation. First, under the requirements of the *Construction Lien Act* itself, in order to preserve various statutory entitlements under the Act, contractors and subcontractors are required to commence a legal claim in the courts within a very tight timeframe after substantial completion of their respective contributions to a construction project, otherwise lien or related claims are deemed to expire. Thus, in terms of the demands being made on the civil justice system, the number of claims filed is not of central importance. A more relevant statistic is the number of hours of court time taken up in trials and preliminary procedures. Here the data indicate that Toronto construction lien cases filed each year in average in Toronto from 1973/74 to 1993/94 represented 2.5% of cases commenced but only .3% of cases tried.⁷² Second, the dramatic increase in claims in the early 1990s, presumably in large part reflects the substantial decline in real estate prices, both residential and commercial, in the recessionary environment of the late 1980s and early 1990s, including the financial failure of a number of large real estate development corporations. Thus, the volume of construction claims in the courts is likely to reflect a large cyclical rather than structural element.

(ii) The Rationale for Construction Lien Legislation

A crude, but not necessarily misplaced response to the demands that construction claims place on the civil justice system in Ontario is to ask whether we need a special lien construction regime at all, and whether repeal of the regime, leaving parties to construction contracts to their normal contractual remedies, would not substantially alleviate these pressures. This paper is not the place to debate this response in detail, given the amount of time, energy, and expertise that has been invested over the years in law reform exercises in this field, both in Ontario and in many other jurisdictions. However, even more modest reform proposals should presumably be informed by some sense of the rationale for the regime. With

⁶⁹ Submission by the Canadian Bar Association - Ontario (Construction Lien Section) to the Civil Justice Review, July 20, 1994.

⁷⁰ Report of Attorney General's Advisory Committee on Alternative Resolution of Construction Disputes, *Too Many Disputes! Too Much Litigation!*, June 1994, at 26.

⁷¹ A.G.'s Advisory Committee, *op.cit.* at 22-26.

⁷² See Twohig, *op.cit.*

respect to the old *Mechanics Lien Act* that the *Construction Lien Act* replaced, McGuinness in his treatise on construction lien law states:⁷³

It appeared that no one understood the *Mechanics Lien Act*, or if anyone did, there was certainly no one who could explain it; second, despite the widespread confusion as to the precise meaning of the Act, there was equally widespread support for the kind of protection provided by the Act; third, despite its widespread popularity, there was equally widespread dissatisfaction with the operation of the *Mechanics Lien Act*.

The new *Construction Lien Act*, which was enacted after a lengthy and exhaustive consultative process coordinated by the Policy Development Division of the Ministry of the Attorney General, attempts to respond to these concerns. While the Act reflects an attempt at fundamental rethinking and clarification of the law, the new regime is itself far from simple or transparent. Without venturing into its complexities, the essence of the regime revolves around four basic statutory remedies provided to contractors and subcontractors in the typical construction pyramid in the event of default or non-payment by parties higher in the pyramid.⁷⁴ First, the Act confers lien rights on any person who supplies services or materials to an improvement for an owner, contractor, or sub-contractor against the property interest of the owner in the premises improved for the price of services and materials provided. Where the owner fails to pay for services and materials supplied to the improvement in accordance with the rules laid down in the Act, his interest in the premises may be sold by the courts pursuant to these lien rights. Second, the Act imposes on payers in the construction pyramid a hold-back obligation of 10 percent of the value of the services or materials supplied under a contract or sub-contract. This basic hold-back, which is non-cumulative, may be augmented by so-called "notice hold-backs" where parties lower in the construction pyramid who have not been paid file lien claims which require payers higher in the pyramid to retain sufficient portions of the contract price to satisfy any lien claims of which they have received written notice. Third, the Act imposes trust obligations upon each payer under a contract or sub-contract in respect of any monies received by him that are to be used for paying for the services or materials that have been supplied to the improvement. In effect, this trust obligation is intended to protect these funds from the claims of non-project related creditors in the event of bankruptcy. Finally, the Act provides for the appointment of a trustee for the premises under construction, at the discretion of the court, on the application of any person having an interest in the premises. The trustee may be appointed to act as a receiver and manager and be empowered to rent or sell the premises, or alternatively to complete and sometimes to re-finance the making of the improvement.

The question that may now be posed is what rationale exists for this special set of statutory protections for creditors in the construction industry when similar protections are not provided to creditors in any other industry. McGuinness in his treatise advances an efficiency rationale for the regime, the basic premise of which is to increase the provision of credit to construction projects.⁷⁵ The credit is essentially being provided by contractors and sub-contractors at the various levels of the construction pyramid who are, in most cases, "first movers" in the

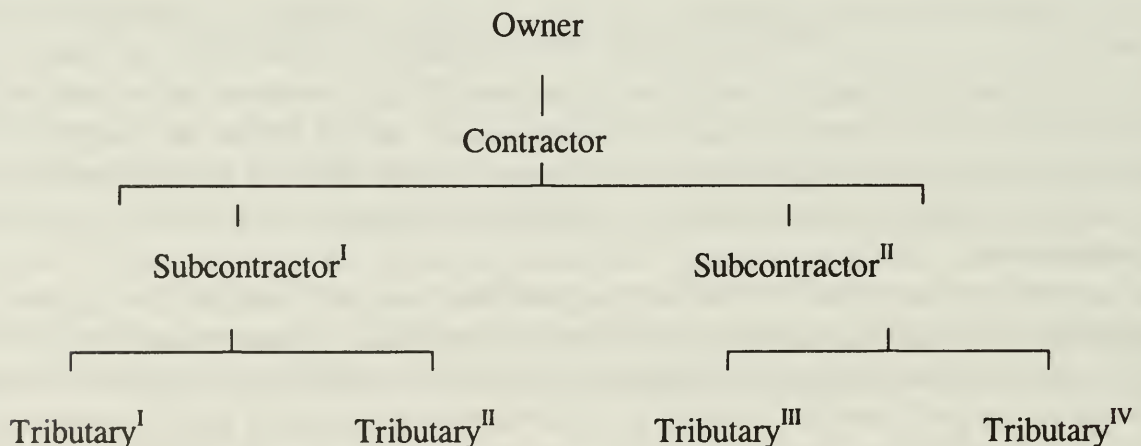
⁷³ McGuinness, *op.cit.* at 4.

⁷⁴ *Ibid.*, chap.2.

⁷⁵ *Ibid.*, at 9-11, and chap. 13.

provision of services or materials to parties higher in the pyramid, who typically are only contractually obligated to pay them in full after substantial completion of their contribution to the project. Construction pyramids for large projects are typically extremely complex, and may involve as many as 60 sub-contractors who may provide as much as 90 percent of the value of the total construction project.⁷⁶ The flow of payments down the pyramid obviously originates with the site owner but at any contractual juncture in the pyramid there is risk of default or non-payment which may interrupt the flow of project funds to parties lower in the pyramid. These risks take a variety of forms, including owners who are over-leveraged; principal contractors who have underestimated their costs; unexpected increases in labour or material costs; unexpected sources of delay that disrupt contractual performance by parties lower in the pyramid; unexpected on-site difficulties; contractors or sub-contractors who are over-extended on non-project related commitments; and deficient performance by contractors or sub-contractors.⁷⁷ The *Construction Lien Act* attempts to fashion a delicate balance between the competing concerns of, on the one hand, providing contractors and sub-contractors in the construction pyramid with security against the risk of non-payment through lien claims against the owner's property interest in the land, and, on the other hand, facilitating cash flows down the construction pyramid that the hold-back provisions (which if observed by the site owner defeat any lien claims against this property) obviously disrupt at some cost to sub-contractors who must pay most of their suppliers in full, even though a hold-back has been retained from them. Whether this balance has been appropriately struck appears to have been at the centre of debates over provisions of the new *Construction Lien Act*.⁷⁸

McGuinness, who was one of the principal architects of the new legislation, claims that the new Act achieves an efficient allocation of these various risks, given the highly interdependent role of the various participants in the construction pyramid, even in the absence of direct contractual relationships, and the transaction and information costs that each would face in attempting to deal with these risks purely through bilateral contracts. McGuinness provides the following example of these interdependencies or externalities:⁷⁹



⁷⁶ *Ibid.*, at 77.

⁷⁷ *Ibid.*, at 91-101.

⁷⁸ See W.L.B. Watts, Forward to McGuinness *op. cit.*.

⁷⁹ McGuinness, *op.cit.* at 114.

In the above project, Subcontractor S^I may be in default in the performance of his subcontract. As a result of that default, the Contractor (C) will have a right to set-off any damages that he may have suffered against any amount that is owed by him to the subcontractor. If the result of that set-off is that S^I receives insufficient money to pay tributary subcontractors T^I and T^{II} , the default by S^I will have an external effect. It is more than possible that T^I and T^{II} will not be paid, even though they may have both fully performed their respective subcontracts. But the potential impact of S^I 's default is not limited to his own payment stream. A major default by S^I may put C into a position where he cannot perform his contract with the owner. If C is himself forced into a default position, the owner may take a set-off against him. This will not only affect the amount of money that is available to pay S^I , T^I , and T^{II} , but it may affect the amount that is available to pay S^{II} , T^{III} , and T^{IV} , even though they are in a completely different payment stream to S^I .

McGuinness claims that the statutory regime efficiently minimizes the transaction and information costs that would be entailed in attempting to deal with these interdependent risks through a purely private contracting regime. While, so far as we are aware, no rigorous empirical studies have been undertaken of the magnitude of these cost savings relative to the cost likely to be entailed in a purely private contractual regime, McGuinness in his SJD thesis at the University of Toronto⁸⁰ reviews the situation in England where there is no statutory regime and concludes that a purely private ordering regime would be less efficient. He notes, for example, that in England half of the land is not under registered title, making lien rights difficult, if not impossible, to operationalize. He notes also that government or government agencies have played a much larger role as site owners and developers in England relative to North America, thus substantially reducing the risk of owner insolvency; that special contractual provisions, such as "nominated sub-contractor" provisions in contracts between owners and principal contractors are cumbersome and incomplete mechanisms for allocating various construction risks; that performance bonds or sureties entail significant transaction costs in their own right; and that credit insurance, which appears to be reasonably widely available in England, is not widely available in North America; and that even if the current Ontario statutory regime were to be repealed completely there is no assurance that this would lead to a reduced volume of construction-related litigation, where default or insolvency by one of the key players in the pyramid occurs, given the extremely complex and interdependent nature of the contractual relationships entailed.

He rightly notes, however, that an overall efficiency judgment while recognizing, on the one hand, that the statutory regime may reduce the risks and hence costs of the provision of credit by contractors and sub-contractors to owners of construction projects, on the other hand must also recognize that the regime increases the risks and hence costs to non-project related creditors of the various parties to construction pyramid by subordinating their claims, in most cases, to claimants in the pyramid. We note also that "string" contracts are a common phenomenon in many other industries and have not led to the creation of similar statutory regimes. For example, a widget manufacturer who has commissioned the custom design of a piece of machinery for his factory to be delivered on a certain date, may have entered into contracts to supply widgets to downstream parties, who in turn may have made commitments to yet further parties, all on the assumption that the machine will be available on the contractually stipulated completion date in well-functioning order. Similarly, shipping contracts

⁸⁰ Kevin McGuinness, *A Theory of Mechanics Liens*, University of Toronto Law School, 1992, Chapter X.

that entail moving goods or machinery from A to B by a certain date may be the premise upon which the shipper has entered into contractual commitments with downstream parties, who in turn may have made commitments to their own customers. Nevertheless, we accept, by and large, McGuinness' overall efficiency judgement that turns on externality and information failure considerations of the kind reviewed earlier in this paper, at least in the absence of empirical evidence to the contrary, recognizing the fact that most players in the construction industry apparently, whatever their roles, generally favour the retention of the regime, and we attach some weight to its survival qualities in all North American jurisdictions, Australia, and New Zealand. Proceeding from the assumption, then, that the basic substantive features of the regime are not amenable to major reforms, we now turn to the procedural dimensions of the regime, which most directly implicate the civil justice system in Ontario.

(iii) Procedural Reforms to the Construction Lien Regime

With respect to policy options for minimizing the legal costs and delays associated with construction claims, we draw heavily on, but extend in several respects, a number of the constructive proposals developed by the Attorney General's Advisory Committee on Alternative Resolution of Construction Disputes and the submission by the CBAO Construction Law Section to the Civil Justice Review. The Attorney General's Advisory Committee carefully documents a number of industry practices that unnecessarily generate disputes which could be avoided and a number of industry opportunities to resolve disputes that cannot be avoided, without using the courts, principally through contractually agreed private mediation or arbitration processes. The CBAO, on the other hand, is principally concerned about the declining number of specialized Lien Masters, who have traditionally adjudicated most disputes under the *Construction Lien Act*, by way of reference from an Ontario Supreme Court judge, and whom the government of Ontario has apparently decided not to replace when they retire, remitting construction-related litigation to the general civil litigation stream. The CBAO is concerned that in regions of the province where specialized Lien Masters are not presently available, construction-related litigation tends to be protracted, in part because judges who are not familiar with the intricacies of the *Construction Lien Act* and sometimes counsel who also lack specialized expertise are required to invest excessive amounts of time in acquainting themselves with the issues.

A number of interesting themes emerge from these two sets of proposals. First, in an area as arcane legally and specialized economically as the construction industry, there are substantial returns to specialization on the part both of adjudicators and lawyers representing clients in construction disputes. In the past, Lien Masters have provided this specialized expertise, and the high quality of their performance seems to be widely recognized throughout the construction industry and among members of the private bar specializing in this area. We think there is a clear case for preserving and expanding on this body of expertise, and the government should reverse any decision that it has taken not to replace the existing special Lien Masters and indeed should commit itself to augmenting their numbers so that they are available throughout all the major regions of Ontario. While some recent trends in court restructuring have perhaps run contrary to notions of adjudicative specialization, e.g. the creation of a single Ontario Court (General Division), other trends such as the creation of a Unified Family Law Court and a Commercial List run in the opposite direction. As one of us

has previously argued,⁸¹ specialization in adjudicative functions, as in other areas of economic activity, is likely to enhance efficiency, both on the part of those charged with the responsibility for adjudication, but also, as a second order effect, by placing a premium on specialized expertise on the part of counsel who represent clients before specialized adjudicators. We note that the Attorney General's Advisory Committee recommends that the Law Society of Upper Canada consider establishing a specialist designation in construction law, so that those in the construction industry can easily identify lawyers who have expertise.⁸² Specialized adjudicative processes will strengthen incentives at both an individual and institutional level to move in this direction.

A second and closely related theme that in our view emerges from the proposals of the Attorney General's Advisory Committee and the CBAO, although not explicitly recognized by either, is the importance of fully costing the provision of publicly-provided adjudication services with respect to construction claims on a user-pay basis. That is to say, the government of Ontario should have no objection to increasing the number of specialized Lien Masters if their services, including salary, benefits, appropriate allocation of costs of physical facilities, utilities, support staff, etc., are covered by fees charged to litigants who avail themselves of the services of these specialized adjudicators. We recognize that full social costing of the provision of judicial services (i.e. full cost recovery) would be a sharp break with historical practice in the administration of the civil justice system in Ontario, but we think that in the current period of fiscal restraint this issue must be squarely confronted. We are able to discern no coherent case for providing public subsidies to the construction industry in the form of dispute resolution services, and indeed these subsidies may have contributed to sloppy contractual practices in the past given the ability of the parties to externalize some of the costs of these on to the public court system. While we recognize, as the data noted earlier in this case study indicate, that the legal costs of litigating construction claims are already very high, these are mostly private costs and the *quid pro quo* for providing more widely accessible specialized adjudicative expertise and reduced delays is that litigants will have to bear as well all the publicly incurred costs. While the issue of full social costing of civil justice services raises much broader issues than we address here, it is difficult to identify any substantial third party interest beyond that of the litigants in most construction lien litigation. Moreover, most decisions are presently taken by Masters, so that we infer that the great bulk of the disputes involve disputes over facts rather than substantial issues of law which may be more appropriate for the judiciary to decide, and very little of the litigation in this field generates judicial decisions of significant precedential value. Moreover, as the history of construction lien legislation indicates, the principal vehicle for law reform in this area has not been the accretion of a substantial body of sophisticated and coherent case law, but instead frequent rounds of legislative amendments (sometime prompted by inappropriate court decisions). With respect to the 5% of construction claims that currently proceed to trial, it would be a useful empirical exercise to examine how many of these involve purely factual disputes (who did what to whom and when, and with what justification), and how many involve disputed points of law. To the extent that disputes involve factual issues, then specialized expertise in the construction

⁸¹ Michael Trebilcock, "An Economic Perspective on Access to Civil Justice", in *Study Paper on Prospects for Civil Justice*, 279 at 291, Ontario Law Reform Commission, 1995.

⁸² *Op.cit.* at p.31.

industry of the kind that might well be possessed or be developed by Lien Masters is presumably of central importance. To the extent that some of the cases proceeding to trial entail disputes over the interpretation of provisions in the *Construction Lien Act*, then rather than relying on accretions of case law to resolve controversies or ambiguities, it would seem more efficient to constitute a permanent legislative review committee comprised of representatives from the various segments of the construction industry and private bar and charge this committee with the responsibility for soliciting concerns over the operation of the Act and periodically recommending e.g. on a five-year cycle, amendments to the Act. This is not dissimilar from the decennial process of amendments to the Federal *Bank Act* or to the process that led to the second generation *Personal Property Security Act* in Ontario.

Perhaps most importantly, an obvious consequence of full costing of publicly provided adjudicative services in this field will be the more rapid emergence of alternative non-court based forms of dispute resolution, precisely as the Attorney General's Advisory Committee recommends, and as is now increasingly reflected in widely prevailing construction contract forms in the industry, such as the new CCDC-2 contract form, developed by the Canadian Construction Documents Committee, which provides for mandatory mediation of all disputes and for arbitration of unsettled disputes at the request of one party (although of course the parties to such a contract can contract out of these provisions *ex ante*).⁸³ As one might imagine the dispute resolution system in the industry evolving, one can conceive of the specialized Lien Masters as publicly provided but privately paid for specialized commercial arbitrators who will compete for business with private mediators and arbitrators for dispute resolution business in this field. To the extent that parties and their legal advisors prefer the publicly provided system, even at fully allocated social costs, to privately provided mediation and arbitration services, the government of Ontario sustains no cost, and generates industry goodwill by providing as many Lien Masters as are required to meet demand. To the extent, on the contrary, that privately provided mediation or arbitration services because of relative cost, timeliness, or expertise turn out to be preferred by many parties to the publicly provided dispute resolution system, then the number of Lien Master positions should be contracted, and existing appointees terminated on a meritocratic basis.

With this competition between public and privately provided mediation and arbitration systems, a number of the other proposals advanced by the Attorney General's Advisory Committee are likely to evolve of their own motion, such as some form of specialty certification of construction mediators and arbitrators by the Arbitration and Mediation Institute of Ontario, perhaps in collaboration with the Council of Ontario Construction Associations. With specialized publicly provided adjudicators and specialized privately designated adjudicators, and the availability of a specialty designation for members of the private bar specialized in construction law, we envisage a healthy form of institutional competition emerging that should cost the Ontario government and Ontario taxpayers next to nothing. This form of institutional competition can be promoted in other ways. For example, we note that the Attorney General's Advisory Committee recommends that the Rules of Court be amended so as to require parties to a construction dispute to participate in private mediation as early in the litigation process as is practicable, before serious cost build-ups occur, typically

⁸³ A.G.'s Advisory Committee, *op.cit.* at 35.

at the time of discovery.⁸⁴ We note also the Committee's recommendation that the *Construction Lien Act* be amended to permit judges to refer disputes to expert private arbitrators with the same authority as Masters, on consent of all the parties.⁸⁵ In other words, the public adjudication system should incorporate substantial private dispute resolution elements. We note also the Committee's recommendation that the government of Ontario and its agencies, as amongst the largest consumers of construction services, should commit themselves to providing leadership in resolving disputes by non-court related means in the contractual arrangements they enter into with firms in the construction industry.⁸⁶ Thus, by modelling the litigation process with respect to construction claims closely on the mediation-arbitration scheme that the industry itself appears to have converged on in its emerging private contractual practices, an efficient form of public-private competition is likely to emerge.

(iv) Conclusion

At least in terms of costs, we believe that construction claims should be a non-issue with respect to the Ontario civil justice system and that through a combination of fully allocated social costing of publicly-provided dispute resolution services in this area, delegation to specialized publicly appointed arbitrators (Masters), a public dispute resolution process that is structured on a closely parallel basis to that now emerging privately in the industry, and full institutional competition between public and private dispute resolution systems, the problem of excessive demands on the civil justice system is readily amenable to resolution. Pricing, incentives, specialization, and institutional competition are the central ingredients in this solution. They may well extrapolate, in whole or in part, to other areas of civil disputing. The Civil Justice Review should be alert to these possibilities.

(c) LANDLORD/TENANT DISPUTES

In Ontario, apart from matters related to rent control and rent abatement (which are the subject of a special regime and tribunal), disputes between landlord/tenant disputes are processed exclusively through the Ontario Court-General Division. This includes disputes over performance of obligations under the *Landlord and Tenant Act*, i.e. issues such as repairs, compliance with covenants, and so forth. The *First Report* of the Civil Justice Review identifies landlord and tenant matters as a priority concern for civil justice reform in Ontario, stating that "landlord and applications are placing significant pressure on the Ontario Court of Justice (General Division)."⁸⁷ According to a recent report that examined the processing of landlord and tenant disputes in the province, including a detailed empirical study of disputing within one urban area (London), serious problems exist with the existing court-focused system

⁸⁴ *Ibid.* at 39.

⁸⁵ *Ibid.* at 40.41.

⁸⁶ *Ibid.* at 42-44.

⁸⁷ Ontario Court of Justice and Ministry of the Attorney General, *Civil Justice Review: First Report March 1995* (Ontario Civil Justice Review: Toronto, 1995), p. 298.

of landlord/tenant law, and there is an urgent need to consider alternatives such as mediation.⁸⁸ In her paper for this Review, Martha Jackman places considerable emphasis on the problems with disputing in the landlord/tenant area, and recommends (to the extent that constitutional law permits) that these matters be taken out of the courts and vested in an administrative agency.⁸⁹

(i) The Nature of the "Problem"

The beginning point of those studies that see a serious "problem" either already present or emerging in the landlord/tenant area is a set of observations on data, rather than an analysis of how the existing system serves or does not serve the kinds of rationales outlined in the framework section of this paper. The data that are seen as evidence of a "problem" include the following:

- there is a substantial increase in the number of landlord/tenant matters before the courts, i.e. an increase of 34% between 1989 and 1993/94⁹⁰
- based on the London sample, which appears indicative of the province as a whole, almost all of the applications brought under the *Landlord and Tenant Act* are by landlords and are for rent arrears and/ or eviction⁹¹
- few of the actions are defended and judgment is almost always given for the landlord⁹²
- survey data indicate dissatisfaction by both landlord and tenant participants with the complex and time-consuming nature of the process, and tenants in particular find the court system intimidating and difficult to understand.

In order to form a sound judgment on whether, indeed, there is a serious problem with the existing system, we should begin by considering the meaning of these data in light of the various rationales discussed in the framework section of this paper, including the facilitation of market exchanges, the correction of market failures such as asymmetrical information, distributive justice, and community.

From the perspective of facilitating mutually beneficial exchanges between landlords and tenants, much of the data cited as evidence of a crisis is susceptible of just the opposite interpretation. The fact that almost all the actions under the *Landlord and Tenant Act* seem connected with tenant default is susceptible to the interpretation that, in fact, the parties are able to settle almost all substantive disagreements about the meaning of their rights and obligations vis-a-vis one another without resort to the civil justice system. However, it is possible that some percentage of tenant defaults are due not to inability to pay rent, or to irresponsible behaviour, but rather reflects a last-ditch tenant response to a failing relationship with the landlord, or more specifically the latter's refusal to deal with their concerns. This

⁸⁸ J. Macfarlane, *The Landlord/Tenant Dispute Resolution Project: Final Report and Recommendations* (London, Ont.: The Landlord/Tenant Dispute Resolution Project, 1994).

⁸⁹ M. Jackman, *The Reallocation of Disputes from Courts to Administrative Agencies*, *infra*.

⁹⁰ *Civil Justice Review: First Report*, *op.cit.*, p. 297.

⁹¹ *Macfarlane Study*, *op. cit.*, pp. 62-64.

⁹² *Ibid.*

would still be consistent with the failure of tenants to enter a substantive defence against the landlord's arrears claims in response to their default if tenants were ill-informed or apprehensive about the responsiveness of the civil justice system to their concerns.

From the data themselves, it is impossible to know whether these figures reflect a malfunctioning system, or simply the normal risk of default that is part and parcel of the business of supplying rental accommodation. An overall figure of about 30-35,000 applications⁹³ a year connected with rent arrears in a province where there are probably well in excess of a million landlord/tenant relationships does not, on its face, seem inordinate. Moreover, the increase of 34% from 1989 to 1993/94 cited in the *First Report* of the Civil Justice Review may well reflect the economic difficulties that many tenants faced during the recent recession.

Of course, from a distributive justice perspective (addressed further below), the fact that an increasing number of individuals have not been able to afford to stay in their homes may reflect a serious and urgent social problem. Furthermore, if the risk of default results in a decrease in the supply of and/or an increase in the cost of residential accommodation, or the refusal of landlords to rent to low-income tenants, then there may well be a serious policy issue. However, the civil justice system and its reform may have only a minimal relationship to these kinds of underlying socio-economic problems.

In any case, we would recommend that, before any serious reforms to the existing system are contemplated, an attempt be made to ascertain the extent to which applications under the *Landlord and Tenant Act* reflect tenants' financial difficulties and the extent to which, on the other hand, they actually reflect problems of contractual interpretation and performance that are endemic to the existing regime, or to which court-focused dispute settlement is inadequately responsive.

The *Macfarlane Report*, in particular, identifies two very specific features of the existing system that can relatively confidently be predicted to skew the parties' choices towards the extreme option of court action for arrears, even when a more efficient, negotiated solution would be available. First of all, Macfarlane notes that there is a substantial public subsidy provided to landlords for court-centred dispute resolution. She estimates, for instance, that even aside from further costs such as hearings, the \$45 application fee required to start an application does not nearly cover the cost of court officials' preliminary routine handling of the file, which could range up to more than \$120.⁹⁴ Since, generally speaking (i.e. apart from pilot projects such as the one Macfarlane herself initiated) Alternative Dispute Resolution methods, such as mediation, do not enjoy any public subsidy, in some range of cases the landlord may choose to go to court rather than attempt a settlement through ADR.

A second and potentially very significant distortion is created by s. 80 of the Act, which states that Part IV of the legislation (that governs residential tenancies) is to apply "despite any agreement or waiver to the contrary." As Macfarlane notes, this section may address itself to the frequent existence of inequality of bargaining power between landlord and tenant, protecting a weaker party from being coerced or misled into waiving statutory rights. It might be preferable, however, to address these concerns through common law concepts such as

⁹³ John Twohig, "Civil Justice Statistical Information in Ontario", Policy Development Division, Ministry of the Attorney General, January 20, 1995, Appendix 2, p.2 (on file with Ministry).

⁹⁴ *Macfarlane Report*, *op.cit.*, pp. 109-110.

duress and mistake, rather than through the existing blanket provision that appears to make all compromise settlements unenforceable.

In cases where some unexpected financial hardship has made it impossible for a tenant to pay full rent during a limited period of time, landlord and tenant may be both better off negotiating an agreement for repayment of the arrears in instalments, or even entailing forgiveness of some of the arrears. Such arrangements are not uncommon in other contexts of long-term contracting, although in the past they have often been impeded by old common law doctrine that limits the enforceability of contractual modifications, doctrine which however has now been modified by case-law or statute in many areas. The evidence presented by Macfarlane as to the very small amount of arrears that is actually collected *ex post* a court judgment, suggests that landlords would have a very strong incentive to agree to a binding compromise that provided some likelihood of recovering a significant portion of areas, while in some cases preserving the long-term relationship.

In our view, charging the full cost of court action to landlords and modifying s. 80 to allow for the enforceability of voluntary and informed compromise settlements (perhaps with a requirement that the settlement be registered with the court) are two immediate steps that could be taken to remove distortions in the present system. Neither of these steps is likely to be costly (and indeed the first may actually result in some modest reduction in public expenditures), and would certainly be much less costly than, for instance, the drastic remedy of removing landlord/tenant matters from the courts and setting up an alternative administrative process or tribunal.

With respect to fundamental reform of the existing system, complaints that the court-based process is complex, costly, and time-consuming have an ambiguous significance. Such negative perceptions of the system would seem, in fact, to place very strong incentives on both landlords and tenants to seek negotiated solutions to their differences. The more accessible and attractive formal, state-provided dispute settlement (whether through the courts or administrative tribunals) becomes, the more likely it is that the parties will regard that process as a first rather than a last resort. Thus, if one is interested in maximizing the extent to which the parties address their differences through consensual bargaining, and minimizing the number of claims in the system, creating a process that is much more attractive and user-friendly may be counterproductive. Of course, reasons of distributive justice and autonomy argue strongly in favour of addressing the experience of vulnerability and disempowerment that those unfortunate enough to have little choice but to resort to the courts may now feel. The point is that there is a trade-off here that is not recognized in the studies that address the issue of landlord/tenant disputing (which somehow assume that a major goal of reform is to remove the burden on the system as a whole).

(ii) Distributive Justice and Autonomy

Clearly what Jackman refers to as the "sense of intimidation and powerlessness now experienced by tenants in the courts"⁹⁵ is likely to be exacerbated in instances where tenants are economically disadvantaged and lack the resources or knowledge base, or both, required to interact effectively with the system. Since housing is a necessity of life, and since what is at stake in a very large number of cases is the possibility of a tenant losing their home, a strong

⁹⁵ M. Jackman, *The Reallocation of Disputes from the Courts to Administrative Agencies*, *op. cit.*, p. 47.

case can be made for giving some priority to this particular area from the perspective of distributive justice. In terms of autonomy as well, where there is an inequality of bargaining power between landlord and tenant, this inequality may further be exacerbated, and the attempts of the statute to correct its effects may be neutralized or undermined if the tenant has vastly unequal access to a process in which her rights may be vindicated.

Among the more comprehensive instrument choices that is identified by the *First Report* of the Civil Justice review is that of shifting landlord/tenant disputes to an administrative agency, should the Supreme Court hold that this is consistent with s. 96 of the Constitution Act.⁹⁶ While identified by Jackman and to some extent by Macfarlane as more accessible or less intimidating to tenants, we question whether an administrative approach will necessarily lead to a vindication of the distributive justice or autonomy rationales. Some administrative processes are highly accessible to individuals without legal advice or representation; others are not. As discussed in the next case study, the Ontario Human Rights Commission is, for instance, an administrative agency where disadvantaged or vulnerable groups or individuals have been extremely frustrated in attempting to vindicate their rights. While formality may be intimidating or off-putting for some disadvantaged persons, an absence of formality may create an impression of bias or inscrutability in the decisionmaking process, and may be even more intimidating. As Macfarlane herself takes considerable pains to emphasize, mediation may be an extremely difficult and frightening exercise for weaker or vulnerable parties, except where the services of a highly skilled and impartial mediator can be guaranteed.

Moreover, there is some evidence that a significant part of the sense of powerlessness that many tenants feel comes from an inadequate knowledge of their legal rights and obligations. While Professor Jackman is confident that "an administrative agency would be in a far better position than the courts to develop programs and provide services (including independent legal advice services) designed to educate landlords and tenants about their respective rights and responsibilities under provincial legislation", it may be that a centralized bureaucracy is not the ideal instrument choice for public education. Support for community-based education projects, clinic programs, and professionally designed advertising campaigns may be more plausible instrument choices.

If a highly significant percentage of the applications for rent arrears actually represent cases where, due to difficult economic circumstances, tenants are unable to continue to pay their rent (at least temporarily), access to an alternative process, whether that of an administrative tribunal or mediation, or better education, are unlikely to address the distributive justice concerns that this raises in the case of disadvantaged tenants in particular. Some of these situations might be effectively addressed by removing the impediment to legally binding compromise settlements in s. 80 of the Act, as we have suggested above. However, since what

⁹⁶ As is discussed extensively by Macfarlane and Jackman, the existing Supreme Court jurisprudence is ambiguous, but tends to point in the direction of unconstitutionality. An appeal from a recent decision of the Nova Scotia Court of Appeal concerning an attempt to shift landlord/tenant matters in that province to an administrative tribunal is awaiting decision by the Supreme Court of Canada (*Reference re Amendments to the Residential Tenancies Act*, (1994) 115 D.L.R. (4th) 129. It is to be noted that this decision while striking down as unconstitutional the proposed scheme in Nova Scotia upheld an existing scheme in that province which employed administrative tribunals, while subjecting their decisionmaking authority to the "supervision" of a s. 96 court. This illustrates the room that may exist, even under a restrictive interpretation of the existing law, to move towards an administrative approach as long as this does not entail completing the ousting the jurisdiction of the s. 96 courts.

is involved here is not a dispute over substantive rights or obligations, it is less than clear why—with this obstacle removed—landlord and tenant could not bargain to a settlement.

An instrument that would seem particularly well-adapted to addressing the problem of default due to immediate economic hardship would be rent insurance. In effect, an insurance fund would cover any shortfall in rent that occurred due to unexpected circumstances (illness, job loss, etc.) up to a limit of perhaps three or four months. Such a fund could be created through contributions of landlords and tenants, with the contributions of the most economically disadvantaged tenants paid by the government. Since such insurance is likely to create a moral hazard problem, with tenants being more inclined to enter into arrangements above their means, and landlords being more inclined to rent to persons in those circumstances, a ceiling on the total amount of rent covered by the insurance might have to be imposed, but a substantial portion of typical rents paid by low- or middle-income tenants would be covered within this ceiling.

From a distributive justice perspective, the effect that risk of default now has on landlord behaviour may be a much more serious concern than dispute settlement procedures. Landlords are increasingly reluctant to rent to low income persons with poor credit records. At one level, this may be alleged to constitute a form of impermissible disparate impact discrimination under the *Human Rights Code*, since vulnerable groups explicitly protected by the Code's classifications are more likely to face discrimination on the ostensible basis of low income or inadequate credit rating.⁹⁷ At another level, it is difficult to simply dismiss the rational economic basis of the landlords' behaviour, when one considers the risk of default and the very slim chance of ever recovering arrears, even after a court judgment, that are exemplified in the statistics in the Macfarlane study. This suggests that, even if they were required by the Human Rights Commission to rent to low-income persons and/or persons with poor credit ratings, landlords would attempt to the extent possible to charge a risk premium, either through higher rents (where permitted by rent control) or through reduction of other services to tenants to compensate for the increased cost from risk of default. Finally, some landlords may simply withdraw from the business of providing accommodation of a character affordable by low income persons. In sum, whatever the intrinsic legal merits of the human rights claims, the effects of a solution based upon anti-discrimination law are unlikely to be optimal from a distributive justice perspective.

From the perspectives of distributive justice and autonomy, there may be serious concern about the existing system if it is indeed true that a significant percentage of landlord actions for arrears arise because tenants view non-payment of rent and eventual exit from the premises as a last resort in the face of landlord non-compliance with obligations, for instance the obligation to maintain the premises in a sound state of repair. If tenants find the system so inaccessible or unresponsive as to justify such an extreme measure as default (which, of course, is costly to the tenant in terms of their credit rating), then it may be worthwhile to consider an alternative set of instruments for dealing with problems that surround complaints of non-compliance with substantive obligations by landlords. One such instrument is proposed as an option by the *First Report* of the Civil Justice Review: "a complaint would be filed with an office of the Ministry of Housing and an Information Officer would attempt to mediate the dispute. If the mediation were unsuccessful, the matter would be referred immediately to a hearings officer who would make a determination and issue a report with recommendations. A party who did not accept

⁹⁷ As noted by Jackman, this issue is now before Boards of Inquiry of the Ontario Human Rights Commission, p. 49.

the report would be entitled to file an application to the court for a hearing before the judge.”⁹⁸ She should bear all costs if the application is rejected.

This kind of instrument is more modest than an attempt to replace the courts with an administrative tribunal system that may or may not be less accessible to tenants (as well as having the advantage of being unambiguously constitutional). In important respects, it resembles the role now effectively played by the Employment Standards Branch of the Ministry of Labour with respect to various classes of employment disputes (reviewed in the next case-study). In addition, it would be worth considering some form of regulatory sanction, such as a fine, for landlords who are the subject of repeated determinations by the Ministry that they are violating substantive obligations of the tenancy relationship (where, of course, these determinations are not successfully challenged in court). Alternatively, a record of repeated determinations of this nature might be taken into account when tenants attempt to challenge proposed rent increases or seek a rent abatement under the rent control regime, or might be made public. However, it is important to be clear that a government-based complaints mechanism will not solve the distributive issues raised by tenant default due to economic hardship.

(iii) Community

Communitarian values seem, to some extent, at play in proposals for moving towards alternatives to a court-based process for landlord/tenant disputes. The claim is that the adversarialism in the judicial process makes it almost impossible, once that process has been initiated, to preserve or restore the landlord/tenant relationship. The preservation of relationships may well be furthered, in addition to efficiency and distributive justice goals, by changing the *Landlord and Tenant Act* so as to permit legally binding compromise settlements. Despite the existence of pilot projects in a number of jurisdictions from the 1970s on, there is, as Macfarlane notes, a dearth of empirical evidence on the actual results of mediation. This absence of evidence as to whether in the landlord/tenant context the nature of disputes and the disputants is such that mediation is likely to preserve relationships that would otherwise break down in the litigation process, suggests caution in recommending mediation as a panacea. As for administrative tribunal processes, it is far from clear that they would be less adversarial in the relevant sense than the courts. Again, this may depend on the character of the disputes in question. That, even on a communitarian rationale, mediation may not prove to be an overarching solution, does not detract from the importance of continuing to support pilot projects that attempt to develop alternative forms of third-party intervention in the context of particular communities. There may be some contexts where a relatively non-intensive form of third-party intervention may in fact prevent a dispute from escalating in the first place, for example the intervention of an interpreter/community worker may be decisive where language or cultural barriers are creating a lack of understanding between landlord and tenant.

(iv) Conclusion

In terms of the general analytical approach and major themes of this paper, perhaps the most important lesson to be drawn from this examination of the landlord and tenant area is the importance of asking the right questions, and obtaining the right data as a pre-condition to

⁹⁸ *Civil Justice Review: First Report, op. cit.*, p. 301.

instrument choice. Significant increases in the number of disputes may not in itself indicate anything amiss in the existing choice of disputing instruments. It is important to understand, through empirical analysis, why there is increased disputing. For example, in the landlord and tenant context, as we have suggested, if increased disputing is a function of hard economic times that lead to tenants being unable to sustain their obligations to pay agreed-on rent, moving the process from the courts to an administrative agency will do little to address the underlying problem (and may remove important protections for tenants against the potentially serious contingency of losing housing). Much more likely to have a positive effect would be amendment of the legislation to permit binding settlements with respect to rent arrears where landlords are able to accommodate tenants' temporary economic difficulties, or alternatively some kind of rent insurance scheme, particularly for low- or medium-income tenants.

(d) THE EMPLOYMENT RELATIONSHIP

(i) Workplace Accidents

As Tucker notes, the problem of workplace accidents has long been addressed in Ontario by a combination of no-fault insurance protection for workers (Workers' Compensation) and "a weak "command and control" model of direct state regulation."⁹⁹ Under this command and control model, statutory and regulatory standards that prohibit or limit a very selective set of risks (e.g. exposure to certain hazardous or toxic substances, dangerous machinery, etc.) are monitored by sporadic visits to worksites by government inspectors and enforced through regulatory or criminal prosecutions of employers. From the 1970s to the 1990s, this approach has come to be supplemented by a range of "new era" policy instruments that could broadly speaking be characterized as incentive-based, market-oriented, or as what Ayres and Braithwaite describe as "responsive regulation"¹⁰⁰. We proceed to examine two such instruments, and experience to date with them, in order to illustrate some of the issues involved in designing new policy instruments to vindicate the multiple rationales of regulation outlined in Sections II and III of this paper.

a. Selected Policy Instruments that Constitute Alternatives to Court-Enforced Command and Control Regulation

(1) *Experience- and Merit-Rating of Worker's Compensation Insurance*

A potentially powerful means of improving the occupational health and safety performance of employers is to experience- or merit rate their Worker's Compensation premiums. In Ontario it has been a longstanding practice to vary premiums according to the historical level of accidents in the particular industry, but experience rating based upon the health and safety record of individual employers is a relatively recent phenomenon, introduced on an experimental basis for certain industries in 1990, and only as of 1995 applicable to industrial

⁹⁹ E. Tucker, "And Defeat Goes On: An Assessment of Third Wave Health and Safety Regulation", paper prepared for presentation at *Corporate Crime: Ethics, Law and the State* conference, Queen's University, Kingston, Ont., Nov. 12-14, 1992, p. 1.

¹⁰⁰ Ayres and Braithwaite, *Responsive Regulation*, *op. cit.*

employers more generally.¹⁰¹ Moore and Viscusi, in a recent study,¹⁰² conclude that the occupational fatality rate in the U.S. would have been 40% higher without workers compensation levies (and without tort), implying that workers' compensation has been far more effective in saving workers' lives than the Occupational Safety and Health Administration (OSHA) regulations, for which the reduction in risk levels has been estimated to be as low as 2%-4%. Workers' compensation premiums in the U.S. amount to over \$10 billion per year, over 1,000 times the level of OSHA fines, so that even modest premium differentials will cost far more than the expected fine for violating regulatory standards.¹⁰³

The basis of the experience rating scheme in Ontario—still referred to as New Experimental Experience Rating, NEER—is an *ex post* adjustment upwards or downwards in an employer's premia for a given year, based upon the total value of the actual claims made for that employer in the year in question. To protect employers from the consequences of fortuitously large claims in a particular year, there is a cap on the total cost of a given claim that can be factored into the calculation of the adjustment in premia (in 1995, \$221,600.)¹⁰⁴

Since 1989, the province has also had a merit-rating program, called "Workwell." This program, pursuant to s. 103 (6) of the *Worker's Compensation Act*, allows firms with exemplary records with respect not only to accident cost and frequency but also to compliance with provincial health and safety standards, to receive rebates ranging from 10 to 75% of premium assessments for a given year.

In terms of the rationale of internalizing costs and ensuring socially efficient levels of precautions and rates of activity, both experience- and merit-rating make a great deal of sense.¹⁰⁵ However, experience-rating, at least in the manner in which it is undertaken currently by the WCB, may threaten the distributive goal of adequate compensation of workplace injuries and may also raise autonomy concerns as well.

Because NEER experience rating is based on the amount of claims paid out it gives employers a strong incentive to put pressure on workers not to make claims or to reduce their amount, and may lead to an increasing number of contested claims. This, at the limit, could significantly undermine the compensation-based logic of the entire scheme. At present, appeals by workers or their representatives appear to constitute 80% or more of appeals to the Workers' Compensation Appeal Tribunal (WCAT).¹⁰⁶ Over the last several years, the caseload

¹⁰¹ See Association of Workers' Compensation Boards of Canada, *Workers' Compensation Experience Rating Programs in Canada*, 1994, pp. 23-27.

¹⁰² Michael Moore and W.K. Viscusi, *Compensation Mechanisms for Job Risks: Wages, Workers' Compensation and Product Liability* (Princeton, N.J.: Princeton Univ. Press).

¹⁰³ Dewees, Duff and Trebilcock, *op.cit.* at 386.

¹⁰⁴ Association of Workers' Compensation Boards of Canada, *Workers' Compensation Experience Rating Programs in Canada*, *ibid.*, p. 23.

¹⁰⁵ See generally, M.J. Moore and W.K. Viscusi, *Compensation Mechanisms for Job Risks* (Princeton: Princeton Univ. Press, 1990).

¹⁰⁶ Ontario, Ministry of the Attorney General (Policy Planning and Constitutional Law Division), "Workers' Compensation Appeal Tribunal", Draft 3 (Larry Fox, author), p. 4.

of the WCAT has been mushrooming¹⁰⁷. With experience-rating of the kind that is now being generalized in Ontario, this problem can be expected to increase substantially, as employers stand to gain substantially where they can successfully challenge claims of their own workers.

From both a distributive justice and an autonomy (equal rights) perspective, there may also be concerns that, in the longer run, experience rating may provide an incentive for employers to discriminate against "thin skull" workers with physical or mental disabilities or dispositions that may result in relatively costlier claims (e.g. rehabilitation costs) arising from accidents. Substantial discrimination against older workers could also result. In contrast to NEER, the Workwell program (established in 1989) permits an adjustment in an employer's premiums based upon an examination of the workplace ("a workplace audit") that analyses the injury potential of the workplace.¹⁰⁸ In determining whether to audit a workplace the WCB looks not only at historical accident costs, but also frequency. Moreover, Workwell addresses a limitation in retrospectively-based experience rating, in that it creates incentives for firms that already have above average performance (and thus are already benefiting perhaps from experience-rating which adjusts premiums according to performance against the average) to take further precautions likely to reduce accidents in the future.

(2) *The Internal Governance System of JHS Committees*

As an alternative to sporadic enforcement of health and safety requirements through government inspections and prosecutions, systems of internal responsibility or governance have often been seen as a particularly attractive instrument, allowing on-going monitoring of, and response to, workplace risks, while government inspectors concentrate on specific problems identified through the internal responsibility or governance system that are unable to be solved within it. Ayres and Braithwaite identify internal responsibility or governance in workplace health and safety as a paradigm of what they term tripartism, which aims (at least to an extent) to replace regulatory approaches that accentuate antagonistic relationships between employers and both regulators and workers with a more consensual model consonant with communitarian values, placing a premium on "cooperation and trust".¹⁰⁹ At the same time, Ayres and Braithwaite themselves suggest that internal governance in occupational health and safety will be most likely to succeed in unionized workplaces, where a union can vigorously support workers' interests when they diverge from those of the employer.

In Ontario, the *Occupational Health and Safety Act*, 1978 has made Joint Health and Safety Committees (JHSC) mandatory for all workplaces of more than 20 employees, or where a "designated substance" are used, or where the workplace is subject to an order regulating the use of toxic substances (now s.9(2)) Membership provisions require that a JHSC of at least two members be formed (now s.9(6)), with at least half of the members non-managerial workers.

¹⁰⁷ *Ibid.*, p. 4. Fox notes: "Using 1990 as a base, the next four years saw the following increases ... 3% (1991); 19% (1992); 43% (1993); 45% (1994)".

¹⁰⁸ For a clear explanation of the program, see G. Worth, "The Workwell Program: Getting the Most From an Audit", *Occupational Health and Safety Canada*, March/April 1992, 104-106.

¹⁰⁹ I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992), p. 59, 86.

The JHSC performs a mixture of proactive and reactive functions (s.9(18)). In its proactive role, it designates a member of the JHSC (certified if possible) to inspect the workplace once a month if practical; if this is impractical, the entire workplace has to be inspected once a year, with at least part of the workplace inspected monthly (s.9(23-30)). The JHSC has the mandate, *inter alia*, to identify hazards (s.9(18)(a)), make recommendations (b-c), obtain information from employers (d-e) and have a representative present at any testing of equipment for safety purposes. Reactively, members inspect critical accident sites (s.9(31)), and as is discussed below, play an important role in the investigation of a situation where a worker or workers exercise the right to refuse work due to a perception of danger.

In its original form as Bill 208, the JHSC was to have an innovative new power of ordering work stoppages. However, business protests followed by a cabinet shuffle led to two major changes being incorporated into the Bill before enactment. In addition to the Workplace Health and Safety Agency being made tripartite rather than bipartite as visualized in Bill 208, JHSC-sponsored bilateral work stoppages now require the consent of the employer as well as the worker certified members (s.45(4)).¹¹⁰

To what extent has the internal governance system of JHSCs led to improved compliance with occupational health and safety requirements and/or a reduction in workplace accidents?

The 1992 Industrial Accident Prevention Association (IAPA) study entitled *Health and Safety Approaches in the Workplace*¹¹¹ examined the effectiveness of the internal governance system of JHSCs in Ontario. The study's motivating concern was that safety, as measured by Workers' Compensation rates, did not seem to be improving despite the regulatory efforts made to improve health and safety over the past 15 years¹¹². The study's overall objective was to develop a comparative profile of manufacturing and retail worksites with low, medium and high Lost Time Frequency Rates (LFTR) of Workmen's Compensation claims so as to identify similarities and differences between the three groups¹¹³. The statistical evidence produced by this study suggests that where JHSTs have significant capacity, i.e. training competent personnel as members or access to outside health and safety expertise, LTFRs are lower, as well as where JHSCs perform executive duties such as approving new technology or setting

¹¹⁰ *Ibid.* at 12.

¹¹¹ Interdisciplinary Health & Safety Research Group, *Health and Safety Approaches in the Workplace: Research Report* (Hamilton: Industrial Accident Prevention Association, April 1992).

¹¹² *Ibid.* at 1. Eric Tucker, while pointing out that statistical measures as to the success or failure of regulatory measures are necessarily problematic, nevertheless concludes from a brief survey of such statistical data related to the effectiveness of Ontario's Occupational Health and Safety system, that while:

the data cannot support such a stark conclusion (that this "third wave" health and safety regulation failed to achieve its objective), nevertheless, it does, when looked at cumulatively, raise serious questions about the efficacy of delegated or default self-regulation...

Eric Tucker, "And Defeat Goes On: An Assessment of Third Wave Health and Safety Regulation" in *Corporate Crime: Ethics, Law and the State* (Queen's University: Conference Papers, Nov. 12-14, 1992) at 75-6.

¹¹³ Unfortunately for the purpose of assessing effect of the *Bill 208* reforms on the operation of the internal responsibility system, it is not clear which period is covered by this survey. While the LFTR data required for rating the worksites were available only for the 1983-88 period, the surveys were mailed and responses were received over the 1990-91 period. *Ibid.* at 14-16.

standards for workplace safety training.¹¹⁴ This may suggest that where JHSCs function according to the ideal, they do have a role in reducing workplace accidents. The performance of the internal governance system in Ontario (and of a comparable system in Quebec) was also the subject of a rigorous empirical study published in 1993, which employed regression analysis in an attempt to isolate the governance system as a factor affecting health and safety performance.¹¹⁵ The study found that there was a significant correlation between the reduction of workplace accidents and the capacity of the JHSC in a workplace, defined as “the extent to which committees undertake a wide range of activities and follow institutionalized procedures, and the extent to which committee members have health and safety training and are provided with information”¹¹⁶. This suggests that where the internal governance system functions as it is intended to, it is an effective means of accident prevention. However, another finding of the study is also of considerable importance, particularly in assessing the claim that more effective regulation is promoted by a reduction in “adversarialism”. The study found that reduction in workplace accidents was positively related to the “protagonistic” nature of worker-management relations on the Committee. A bluntly adversarial approach to debating and deliberating on workplace risks apparently produces more effective collaboration in the practical management of these risks. By contrast, disputing in the labour context assumes that adversarialism tends to impede a functioning cooperative relationship between protagonists. As the authors of the study note: “Adversarialism and collaboration are often presented in the industrial relations literature as alternative strategies. It appears, however, that adversarial and collaborative behaviour tend to be found together.”¹¹⁷

(ii) Non-Occupational Health and Safety Related Employment Standards

In the case of a variety of employment standards mandated by the *Employment Standards Act* of Ontario¹¹⁸, an innovative administrative process exists that allows an officer of the Ministry of Labour to make orders against employers in violation of the Act, including orders that compensation or other relief be provided by the employer to employees who are victims of violations of the legislation. The standards at issue include: minimum wages; hours of work and overtime pay; public holidays; paid vacations; equal pay for equal work; pregnancy and parental leave; and termination and severance pay.

Upon receipt of an employee complaint the Ministry officer conducts an investigation and decides whether to issue an order. This process is subject to administrative law fairness requirements, including *audi alteram partem*. Either an employee or an employer may appeal the decision of the officer. The appeal includes an oral hearing before an Adjudicator that

¹¹⁴ *Ibid.*, p. vii.

¹¹⁵ C. Tuohy and M. Simard, *The Impact of Joint Health and Safety Committees in Ontario and Quebec*, study prepared for the Canadian Association of Administrators of Labour Law, January 1993.

¹¹⁶ *Ibid.*, at 5-6.

¹¹⁷ *Ibid.*, at 6.

¹¹⁸ R.S.O. 1990, c. E. 14. Our observations on the employment standards area rely upon work done by the Ministry of the Attorney General, Policy Division for the Civil Justice Review. We are particularly grateful for first rate information and analysis supplied by Larry Fox and his colleagues in the Policy Division.

typically lasts 1-2 days. Mediation is also available in order to solve a dispute prior to the completion of the formal appeal process.

According to information provided by the Ministry of the Attorney General, in the fiscal years 1993-1994 and 1994-1995, the Ministry of Labour dealt with about 19,000 complaints. In about a third of the cases, the Ministry investigation was sufficient to induce a voluntary settlement whereby the employer paid the moneys owed the employee. In only about 25% of cases was the complaint found not to merit an order. On average this entire process takes less than four months. The Ministry recovers costs of operating this process through assessing a 10% administration fee on any employer against whom an order for compensation has been issued. Based again on 1993-94 and 1994-95 figures, about 700 orders are appealed each year. However, more than half of these appeals are settled before they reach the stage of a formal hearing. The entire budget for the appeals process is a mere \$1.3 million per year.

It is difficult not to be positively impressed with this record. From a distributive justice perspective, it is notable that access to the process is very inexpensive for employees; they are charged no fees and Ministry officials bear the entire cost of carriage of the case. It is important that these achievements with respect to distributive justice are not pursued at the expense of corrective justice. The *Employment Standards Act* does not exclude or even limit the civil right of action of an employee with respect to any statutory violation. This belies the very frequently urged claim (criticized later in this paper in the human rights context) that preserving a right of access to the courts is inconsistent with the proper functioning of an administrative/bureaucratic process for settlement of disputes. As well, it is notable that the administrative/bureaucratic process serves compensation goals with apparent effectiveness while nevertheless being fault-based and thus remaining adversarial in character (an employer must have violated the Act for compensation to be awarded and it is the particular employer who violated the Act that pays, not a compensation fund, assuming the employer is solvent). Moreover, the due process protections of administrative law are fully preserved—indeed, these protections go beyond the minimum, in that Ministry officers usually afford written reasons even for the initial order or for a refusal to grant an order. Again, contrary to much conventional thinking about instrument choices in the settlement of disputes, there is no inherent tension or contradiction between fair procedures that go to values of autonomy and corrective justice and the efficient and timely provision of compensation.

If there is anything troubling in the employment standards area, it is the relatively small number of complaints relative to inquiries received by the Ministry (the latter numbered about one million in 1992). This ratio may be telling a relatively positive story; once employees are informed of their rights they may no longer believe the employer is in violation of the Act, or alternatively, when given the specifics of the employer's obligations may be able to persuade her or him to comply. On the other hand the story may be less positive—there may remain important communications gaps between the Ministry and many employees making inquiries, or workers may be intimidated into failing to bring complaints, on threat or implicit threat of dismissal or other harassment.

We simply do not have available information on the reasons why a very large percentage of inquiries do not result in complaints. It may be useful, to begin with, to survey systematically or at a minimum selectively those employees who make inquiries of the Ministry and then do not end up pursuing complaints. As well, it may be worthwhile considering the grafting on of a deterrence function to the process (deterrence is now addressed through the relatively cumbersome possibility of a prosecution in the case of repeated violations of some employment

standards). For instance, where employer violations of the Act have been particularly egregious or where there is evidence of intimidation or harassment of employees to attempt to discourage them from pursuing complaints, it might be appropriate to consider explicitly empowering the Ministry officer to order not only compensation for wage or other payments owed, but additional damages to compensate employees for non-pecuniary losses due to the employer's attitude towards their rights.

(iii) Conclusion

The area of the employment relationship is one where alternatives to civil liability and litigation have been in operation for some time. There are several crucial lessons and themes that emerge from an examination of these alternative instruments; 1) the workers' compensation scheme reinforces the notion, already developed in the medical malpractice section of this paper, that replacement of tort liability with no-fault compensation requires careful attention to the design of instruments to fulfil the deterrence function, which is not served, and indeed may be undermined, by a straightforward compensation arrangement. At the same time, risk and experience-rating of workers' compensation premia may create undesirable second-order incentive effects, such as dismissal or failure to hire workers who are particularly vulnerable to injury for reasons of age, physical or mental disability etc. This in turn suggests an important and complex challenge of designing a deterrence instrument that responds to risk and activity levels in workplaces, not to the injury-vulnerability of workers; 2) the experience with Joint Health and Safety Committees in the workplace accident context suggests that in some contexts internal governance systems may be an effective means of vindicating deterrence or compliance concerns, while also serving communitarian values that support the reinforcement of long-term relationships. However, internal governance seems to be most effective where there is relatively equal bargaining power between the parties, i.e. in this context where strong and effective union representatives are present to vigorously advance the employee point of view; 3) the experience of the Joint Occupational Health and Safety Committees, as well as with the process for enforcing the *Employment Standards Act*, suggests that we should put in question the frequent reflex to identify adversarialism as an undesirable dimension of the traditional litigation process to be overcome through alternative dispute settlement instruments. Alternatives can function effectively while maintaining a basically adversarial structure, and indeed as in the case of the Joint Occupational Health and Safety Committees, adversarialism may play a positive role, reflecting a confidence of both parties in the capacity to assert frankly their interests and points of view where these genuinely conflict with those of the other party; 4) As the employment standard case shows and as we concluded in the medical malpractice case as well, the complete elimination of a civil right of action need not be an essential component of every well-functioning scheme that provides alternative administrative/bureaucratic remedies.

(e) THE ONTARIO HUMAN RIGHTS CODE AND COMMISSION

The *Ontario Human Rights Code* provides the right to equal treatment without discrimination with respect to, *inter alia*, employment, accommodation, membership on vocational associations, the making of contracts and the provision of services, goods and

facilities.¹¹⁹ Section 29 of the Code sets out the functions of the Ontario Human Rights Commission (OHRC), which include research and public education, the investigation of and response to discrimination in communities, and the assistance of public and private organizations in the development of anti-discrimination programmes. The broad mandate provided the Commission reflects the view that discrimination is a problem with systemic and broad social dimensions that cannot be addressed adequately through the traditional bipolar model of litigation. At the same time, in providing a process for the pursuit of individual complaints of discrimination, the Code reflects the important values of corrective justice and autonomy that are implicated in the pursuit of autonomy, and which ultimately point to the opportunity to confront the person who has violated one's rights before an impartial tribunal.

By virtue of the *Bhaduria* case, a well-known decision of the Supreme Court of Canada,¹²⁰ access to the Courts for individual claimants under the *Code* has been precluded. The consequence of *Bhaduria* was that an effective monopoly was conferred on the Ontario Human Rights Commission with respect to the processing and resolution of individual complaints under the *Code*. This monopoly on individual claims may actually have made it more rather than less difficult for the Commission to devote resources to its broader mandates of addressing the larger social determinants of discrimination (through education and human rights training, for example). Secondly, human rights claimants have experienced delay and disempowerment in the claims process, which has taken on many of the negative features of civil litigation that the creation of an administrative agency was supposed to avoid, while compounding these with some of the drawbacks of bureaucracy (an absence of political independence, and an approach to claims that may be strongly influenced by internal organizational priorities and hierarchies).

Before addressing the possible solutions to these difficulties it is useful to present a brief overview of the Commission claims process and some recent reviews of that process.

(i) The OHRC Complaints Process

Despite what might seem to be implied by its broader mandate, the Commission has relied largely on the processing of individual complaints as a mechanism for enforcement of the Code.¹²¹ Complaints may be filed by the complainant, or by the Commission itself, either on its own initiative or following the receipt of a request to file from a complainant. The Commission is then required to investigate and try to settle these complaints.

¹¹⁹ The following summary of the *Code*, the structure and the operating procedures of the Commission depends heavily on the following sources: Ontario, Ministry of the Attorney General (Policy Division) "Draft Memorandum on the Ontario Human Rights Commission (3d Draft)" (author: Larry Fox), hereinafter "Draft Memorandum"; G. Sanson, "A Practical Guide to Employment Discrimination Complaints Processed Under the Ontario Human Rights Code and Employer-Initiated ADR, unpublished, hereinafter "Practical Guide"; P.A. Neena Gupta, "Reconsidering *Bhaduria*: A Reconsideration of the Roles of the Ontario Human Rights Commission and the Courts in the Fight against Discrimination", LL.M. Dissertation, Faculty of Law, University of Toronto, 1993, (hereinafter "Reconsidering *Bhaduria*"). Mary Cornish, *Achieving Equality* (Ministry of the Attorney-General, 1994).

¹²⁰ *Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduria* (1981), 124 D.L.R. (3d) 193, (hereinafter *Bhaduria*).

¹²¹ While the Code also creates a number of offenses, there in fact have been no such prosecutions under the Code since 1981.

The procedure of the Commission entails several stages. First, there is an informal resolution process available, via "Early Settlements Initiatives (ESIs)", where an intake officer will intervene and attempt to resolve the situation prior to the filing of a formal complaint. Forty-one percent of the case closings from 1994-5 were withdrawn or settled ESI's that resulted from this informal procedure. If ESI procedures fail to resolve the complaint, what the Commission terms a "formal" complaint is filed. There are a number of possible outcomes from this second stage. The OHRC may exercise its discretion under s.34¹²² and decide not to deal with a complaint; the complaint may be settled, withdrawn, dismissed or abandoned.

Finally, in those cases where the OHRC is unable to effect a settlement it may refer the subject-matter of the complaint to a board of inquiry.¹²³ If the Commission refuses to do so, the complainant may apply for a "Reconsideration". Where, the Reconsideration results in a continued refusal to refer the matter to a Board of Inquiry, this refusal is subject to judicial review on standard administrative law grounds.¹²⁴

(ii) Mandate of Board of Inquiry

The Board of Inquiry is charged with determining whether the complainant's rights under the Code have been infringed by the respondent, and for making an appropriate order if an infringement is found. A broad scope for remedial orders is conferred on the Board, including monetary awards, reinstatement of a dismissed employee, and measures in the workplace to ensure that future discrimination does not occur. The *Statute Law Amendment Act* (Government Management and Services), 1994 (Bill 175) incorporated two major reforms to the board of inquiry procedure. First, the Commission may now refer the complaint directly to the board of inquiry, whereas previously it was referred to the Minister of Citizenship, who was then required to appoint an *ad hoc* board of inquiry from an existing panel of members. Further, these *ad hoc* boards have been replaced by a standing board of inquiry, appointments to which are made by the Lieutenant Governor in Council from an existing roster of 35 adjudicators.

(iii) Data on Claims Processing and Resolution

Perhaps the most unambiguous evidence of a crisis in the dispute processing role of the OHRC was the increasing backload of claims during the late 1980s. This is reflected in the following time delays in processing of claims in 1994-1995 (which, however, reflect only partly the problem at its worst, since in the early 1990s some additional resources were provided to the Commission to deal with the backlog and the 1994-95 figures may reflect some corresponding improvement in processing times). With respect to claims resolved through Early Settlement, the average processing time was 160 days (almost 6 months), and the median period was 132 days.¹²⁵ With respect to formal complaints that were terminated in

¹²² Ontario Human Rights Commission, Draft 3 at 6.

¹²³ Chart 6 of the Report indicates the infrequency with which cases are forwarded to boards of inquiry.

¹²⁴ Gupta, "Reconsidering Bhaduria", *op. cit.*, pp. 51-55.

¹²⁵ "Draft Memorandum" (3d. Draft), p. 6.

fiscal year 1994-1995, the average time was 681 days and the median time period was 624 days.¹²⁶

Beginning in the late 1980s, delay and inefficiency in the processing of complaints by the OHRC was the subject of an increasing number of petitions to the Office of the Ombudsman for Ontario. On the basis of an in-depth investigation of 38 of these cases of alleged delay between June 1989 and March 1991, the Ombudsman issued a Special Report on the Ontario Human Rights Commission.¹²⁷ According to the Report, "The Ombudsman found delay in commencing, conducting and completing investigations in each of the 38 cases examined. The processing time of these cases ranged from one year to nine years, during which there had typically been little investigative activity. Most of the cases had been inactive for long periods of time."¹²⁸

In response to the Ombudsman's investigation and recommendations the OHRC adopted a Case Management Plan that has resulted in some significant progress in the clearing of the case backlog. This Plan was supported by increased government funding to enable the hiring of additional OHRC personnel. However, reviewing the performance of the Case Management Plan in 1993, the Ombudsman remarked: "the extra staff closed many fewer aged cases than was expected during their one-year term."¹²⁹ This being said, acceleration in the closing of files, even to the extent it has taken place, is less than a perfect surrogate for adequate and prompt access to justice. Anecdotal evidence from practitioners in the human rights field suggests that, under pressure to clear up the backlog, some personnel at the OHRC may be exercising pressure on complainants to settle at an early stage, to drop their claims, or to accept often close to worthless kinds of redress (such as apologies or *pro forma* letters of recommendation in the case of a dismissed employee). As Gupta notes, Commission personnel have enormous leverage to pressure complainants to settle, by suggesting to complainants with varying degrees of subtlety that if they not do so they risk the Commission refusing to refer the matter to a Board of Inquiry.¹³⁰ Concerns about delay and other aspects of the OHRC's complaints processing and resolution practices led the Ontario Government to establish a Task Force to conduct an independent review of the Commission. The Task Force was headed by human rights lawyer Mary Cornish. Representations to the Task Force by various groups and individuals suggested problems going far beyond mere delay or inefficiency. Widespread frustration was expressed with the perceived lack of complainant choice and control during the various stages of the OHRC process. The claimant was absent when the decision as to whether to refer a case to a hearing or dismiss it was made. Further, if it was decided that the claim actually would proceed to this final stage, the Commission itself held carriage of the claim, and thus decided how to argue the case. If the complainant then disagreed with the position OHRC lawyers were taking in presenting the case, they would have to retain their own lawyer

¹²⁶ *Ibid.*, pp. 6-7.

¹²⁷ Ontario Ombudsman, *Special Report On the Ontario Human Rights Commission*, July 12 1993.

¹²⁸ *Ibid.*, p. 2.

¹²⁹ *Ibid.*, p. 4.

¹³⁰ Gupta, "Reconsidering Bhaduria", *op. cit.*, p. 49.

for alternate representation.¹³¹ According to a number of submissions to the Task Force, “staff of the Human Rights Commission were sometimes uninformed, insensitive and biased. People with a disability said they could not always count on Commission staff to recognize or understand the discrimination they experienced. People with low incomes, lesbians, gay men, and people of colour spoke of being treated with disrespect.”¹³² As became evident to the Task Force as well, the OHRC had been able to dedicate minimal resources to self-initiated investigations or initiatives targeted at addressing broader issues of systemic discrimination.

The most radical of the Task Force’s recommendations were its suggested institutional reforms. Taken together, these reforms reflect, at least to some extent, the basic insight (quite congenial to our instrument choice approach) that different institutions and different instruments may be appropriate to fulfilling multiple goals and values explicit or implicit in the Code. Hence, the Report recommends that the human rights enforcement system be divided into three components. First, the Commission would be retitled “Human Rights Ontario”, but more significantly its sole function would be to assume a proactive role against systemic discrimination, through advancing key systemic cases (for instance, through initiating its own complaints) and by fulfilling educational and research functions.¹³³ The Equality Services Board would instead assist the processing of the initial stages of human rights claims, through the establishment of decentralized “Equality Rights Centres” around the province. The Task Force’s emphasis on community involvement was clearly reflected in proposals for these centres, which are not only community-based but which also serve as a means for existing community advocacy organizations to do intake and/or representation and/or bring test cases.¹³⁴ This would thus assist a community group in pursuing a systemic claim.¹³⁵ Third, for those claims that are not resolved at an earlier stage, the Equality Rights Tribunal would serve as a permanent body of adjudicators that would provide decisions in human rights complaints within statutorily-mandated time limits.¹³⁶ Of considerable importance is the recommendation that an individual have the right to bring a claim directly before the Equality Rights Tribunal, for instance if they are dissatisfied with the earlier handling of the matter by Equality Rights Centre staff. Individuals would be given the choice of having their complaint before the Tribunal argued by themselves, by Equality Rights Centre staff, by representatives from community and equality-seeking groups or by their own para-legal or lawyer. The Tribunal would also have a Mediation section, aimed at providing mediation services as an alternative to resolving a complaint through a hearing where the parties to the complaint wish to deal with the matter through this avenue.

From an instrument choice perspective, we have several main observations and criticisms concerning the major reforms recommended by the Task Force in its report, *Achieving Equality*. First of all, by providing more avenues for complainants to pursue their complaints,

¹³¹ *Ibid.* at 17.

¹³² *Achieving Equality, op. cit.*, p. 20.

¹³³ *Ibid.* at 35.

¹³⁴ *Ibid.*, at 35.

¹³⁵ *Ibid.*, at 68.

¹³⁶ *Achieving Equality, op.cit.*, pp. 133-134.

the approach adopted by the Report would end the monopoly of the OHRC on human rights enforcement in Ontario. This is desirable from corrective justice and autonomy perspectives, from which it would seem almost contradictory to afford rights to individuals and then give a government bureaucracy a decision-making monopoly on whether or how they can be enforced. From a distributive justice perspective, the decentralization of the initial complaint process, and the support for complainants, affords, in principle, a better opportunity for disadvantaged persons to vindicate their rights. The renewed emphasis on systemic discrimination is also in order, from a distributive justice perspective. From the perspective of community, the emphasis on dispute processing techniques and resources that are community-focused seems positive, as well as the provision of mediation services by the Tribunal.

However, once one examines some of the second-order instrument choices recommended by the Report, some difficulties emerge. First of all, the proposal for the creation of an ambitious network of state-of-the-art Equality Rights Centres is, as is implied in the Report itself, premised upon a substantially increased level of public resources for the enforcement of equality rights in Ontario. In this respect, and indeed in many others, the instrument choices recommended by the Report seem ill-adapted to the present fiscal climate (and indeed it is significant that, in the two years following the Report, the NDP Government made no attempt to implement this series of recommendations).

A more cost-effective instrument choice could be to rely upon the existing network of human rights practitioners, community legal aid clinics, community organizations, and so forth, to assist complainants in accordance with a fixed fee schedule, combined with a rule that would permit recovery of these costs from the respondent where the complainant is successful. Ultimately, with an appropriate set of cost rules, liberalization of the existing constraints on contingency fees may obviate the need for direct public funding. As well, while decentralized, the Equality Rights Centres nevertheless still seem conceived along bureaucratic lines—they are to be staffed by full-time Equality Service Board employees, and while to the Report's credit it also envisages that existing community resources could receive public support as well, it is clear that the intent is to funnel the bulk of public resources into the Centres. The Centres, in most cases, would constitute quasi-monopolies on publicly-funded complainant support.

Secondly, we find it curious that the Report has not pushed its logic of decentralization further. Why should a new, centralized government agency be created to pursue activities such as systemic discrimination test cases and human rights education? It may be that lack of resources is the major reason why the OHRC has not been more aggressive in pursuing novel systemic discrimination complaints. But one cannot ignore the possibility that the bureaucratic culture and career paths that are likely to predominate in a government agency may not be well suited to pushing the limits of equality rights. Of no small significance also is the fact that the Government of Ontario is the largest employer in the province, with the inevitable result that officials of a government agency are faced with the prospect of tackling, in some sense, their own masters. In lieu of re-centralizing the function of pursuing challenges to systemic discrimination, it would arguably be preferable to initiate something along the lines of an Equality Challenges Fund, that would provide support for test cases initiated by community groups, public interest groups and individuals with their own counsel. Here, as with the Federal government's program to support Charter challenges and minority (e.g. linguistic rights) claims, administration of the Fund would be by a Board of respected human rights leaders and advocates and would be independent of government. In fact the Report actually

envisages the possibility of such funding¹³⁷, which makes it even more mysterious why one would need a government agency to perform this function at all.

Another flaw in the Report is its rather cursory dismissal of the possibility of permitting civil actions for discrimination. The Report repeats the traditional arguments for excluding the courts—that civil litigation is characterized by an “individualistic, legalistic approach to human rights”, that delays and large costs are endemic to the litigation process, and that judges lack expertise and understanding of human rights matters. It is ironic, of course, that the Task force itself owes its existence to the fact that the alternative to the courts embodied in the OHRC has become chronically burdened with all these flaws that are supposedly the justification for removing human rights matters from the courts in the first place. The Report’s observation that “taking a human rights case to court is an option usually only available to people who can afford to do so” abstracts completely from the possibility of re-examining costs and contingency fee rules in the civil justice system, at least as they apply to this kind of action. As for lack of expertise and understanding of human rights issues on the part of judges, one would have hoped that the Report would at least acknowledge that the bald assertion of such a state of affairs, drawn from pre-Charter era literature, would deserve some reconsideration after thirteen years of Charter jurisprudence.¹³⁸

Moreover, allowing complainants to elect between an administrative process and the courts allows them and their advocates to make reasoned judgments about where the most appropriate forum may lie for dealing with a given human rights issue. It seems highly paternalistic to imply that complainants and their advocates will make choices for the courts based upon delusions about their capacity to deal with such claims. The Report also expresses the concern that allowing an election for the courts might “lead to conflicting judgments from courts and tribunals.” Certainly, permitting an election would require some rules to deal with the possibility of concurrent proceedings in more than one forum, where, for instance, in a given situation with more than one complainant but a similar fact pattern or issue, some complainants choose the courts and others the Tribunal. However, these issues are already present, since (as Gupta explores in depth) discrimination complaints already figure in disputes concerning collective agreements, as well as, for instance, in wrongful dismissal actions. As well, since any Tribunal decision would be reviewable for error of law by the Courts (and indeed interpretations of the *Code* by Boards of Inquiry are not currently always shown much deference by the Courts) it is an error to suggest that the Courts have ever been really excluded from this domain. Access to the Courts as an alternative to the administrative process would be particularly useful, of course, where it is appropriate to join a *Code* complaint with some other legal claim, for example that Charter rights have been infringed.

Just as we consider litigation as an appropriate alternative instrument, we also think that greater emphasis could be placed on internal responsibility for realizing the objectives and letter of the *Code*. Approximately 75% of *Code* claims have typically concerned workplace discrimination. Many larger workplaces already have internal procedures or mechanisms for dealing with some kinds of human rights-related complaints, for instance sexual harassment. The Report, as noted, recommends the use of labour arbitration as a human rights compliance instrument, and recommends as well that the proposed new human rights bureaucracy, Human

¹³⁷ *Ibid.*, p. 58.

¹³⁸ See, generally, Gupta, “Reconsidering Bhaduria”, *op. cit.*

Rights Ontario, "should encourage employers to set up fair and effective internal procedures for the resolution of workplace human rights claims which are developed in partnership with their employees or negotiated with their unions."¹³⁹ But there is a stark contrast in the detail and comprehensiveness of the Report's recommendations for a new bureaucratically-oriented process, and this general "good will" recommendation about internal responsibility. Whether or not one would want to go so far as to mandate the creation of internal responsibility mechanisms in workplaces above a certain size (as with occupational health and safety), it might at least be appropriate to provide in legislation a kind of model for such an internal governance system, which however a particular enterprise could opt into or out of, or vary in certain circumstances. In addition, it is worth considering incentives to encourage the development of effective internal governance systems. At present, as Sanson notes, in deciding whether to proceed with a complaint to the Board of Inquiry stage, the Commission may take into account whether "an employer has instituted effective workplace anti-discrimination policies and/or an internal dispute resolution process."¹⁴⁰ While, as noted above, we endorse the reforms proposed in *Achieving Equality* that would permit a complainant to proceed to the Tribunal as a matter of right, it may be appropriate to qualify this right, such that where the employer can show that there is a well-established internal responsibility system in place, the onus shifts to the employee to make out a *prima facie* case that this system has failed to deal adequately with her particular complaint. Alternately or additionally, where such a system can be shown to be in place, but where in a particular instance discrimination nevertheless was proven to have occurred, the liability of the employer might be decreased.

(iv) Conclusion

In terms of the broader themes of this paper, there are two crucial lessons that emerge from our consideration of the record of the Ontario Human Rights Commission; 1) it is naive to identify administrative processes as having intrinsic properties that obviate some of the most evident drawbacks in the civil litigation process, such as delay and complexity in decisionmaking and disempowerment of those who are relatively disadvantaged; the record of the OHRC makes it abundantly clear that an administrative process can carry with it all these defects; 2) particularly the jurisprudence that led to tort actions being barred for violation of human rights protections in the Code assumes the progressive nature of the idea that one institution, agency or process should be charged with vindicating a wide range of goals including prevention/deterrence, compensation, corrective justice, and even public education and transformation of social values. The OHRC example dramatically illustrates the thesis of this paper that failure to disaggregate goals and the instruments and institutions that can best serve these multiple goals in a particular context is likely to lead to regulatory incoherence and failure, as instruments and institutions are assigned roles that they are ill-fitted to perform or that are in contradiction with other roles that they have been assigned. Thus, our main recommendations in the human rights area, partly consistent with but much more far-reaching than those in the Cornish Report, are that a plurality of instruments should be employed to address the various goals and values at issue, including civil rights of action, interna

¹³⁹ *Achieving Equality*, *op. cit.*, p.107.

¹⁴⁰ G. Sanson, "A Practical Guide to Employment Discrimination Complaints Processed Under the Ontario *Human Rights Code* and Employer Initiated ADR", *op. cit.*, p. 9.

governance where the human rights issues arise in an employment context where a governance structure can be institutionalized under circumstances of relative equality of bargaining power, or contracting out of educational functions to community or other non-governmental, non-bureaucratic organizations and groups.

5. CONCLUSION

The instrument choice approach deployed in this paper and applied to our five case studies (medical misadventure, construction liens, landlord/tenant, employment relationships, and human rights) suggests that any generic or global strategy for reforming the civil justice system is likely to be misguided. In different contexts, the use of litigation-based policy instruments entails very different trade-offs between diverse and sometimes conflicting public values, as would their replacement or supplementation by alternative instruments.

In the case of medical misadventure, a no-fault compensation scheme seems to have many virtues from the perspective of distributive and administrative efficiency goals. However, deterrence and corrective justice concerns strongly suggest the importance, respectively, of risk- and or experience-rating for insurance premia and the maintenance of a right of action in tort for particularly egregious cases of wrongdoing.

We believe that construction claims is an area ripe for experimentation through a combination of fully allocated social costing of publicly-provided dispute resolution services in this area, delegation to specialized publicly appointed arbitrators (Masters), with full institutional competition between (unsubsidized) public and private dispute resolution systems.

Perhaps the most important lesson from our examination of the landlord and tenant area is the importance of asking the right questions, and obtaining the right data as a pre-condition to instrument choice analysis. It is important to understand, through empirical analysis, why there is increased disputing. If increased disputing is a function of hard economic times that lead to tenants being unable to sustain their obligations to pay agreed-on rent, moving the process from the courts to an administrative context will do little to address the underlying problem (and may remove important protections for tenants against the potentially catastrophic event of losing housing).

The area of the employment relationship is one where alternatives to civil liability and litigation have been in operation for some time. Experience with the workers' compensation scheme reinforces the notion developed in our study of the medical misadventure area, that replacement of tort liability with no-fault compensation requires careful attention to the design of instruments to fulfil the deterrence function, which is not served, and indeed may be undermined, by a straightforward compensation arrangement. The experience with Joint Health and Safety Committees in the workplace accident context suggests that in some contexts internal governance systems may be an effective means of vindicating deterrence or compliance concerns, while also serving communitarian values that support the reinforcement of long-term relationships. However, internal governance seems to be most effective where there is relatively equal bargaining power between the parties, i.e. in this context where strong and effective union representatives are present to vigorously advance the employee point of view. In the case of Employment Standards, an administrative/bureaucratic process for addressing complaints under the legislation has effectively co-existed with a civil right of action for wages and benefits owed. This puts in question the frequent assumption that such a process, if it is to work well, must exclude the possibility of a choice by the complainant between administrative action and civil litigation.

Our consideration of the record of the Ontario Human Rights Commission suggests that it is naive to identify administrative processes as having intrinsic properties that obviate some of the most evident drawbacks in the civil litigation process, such as delay and complexity in decisionmaking and disempowerment of those who are relatively disadvantaged. As is suggested by the example of the Joint Health and Safety Committees which we examined in the Workplace Safety case study, internal governance instruments may also be appropriate in the human rights context. Just as we have emphasized in the Medical Misadventure study, in the case of human rights we also see advantages, especially from a corrective justice perspective, in the co-existence of some kind of civil right of action with bureaucratic/administrative remedies. The example of Employment Standards illustrates that there is no intrinsic reason why a bureaucratic/administrative process cannot effectively co-exist with an elective civil right of action. Indeed, just as in the case of Construction Claims where we see advantages to experimenting with institutional competition between private and public dispute settlement, in the human rights context we would view as healthy an element of institutional competition between bureaucratic and administrative processes and the courts.

In thinking carefully and systematically about the role of civil justice in the choice of governing instruments, we believe that the analysis we have developed in the framework section of this paper, as illustrated and applied in the five case studies, underscores the importance of asking the right questions with respect to any proposed involvement by the state in economic and social activities in response to the perception of a problem. Asking the right questions does not, of course, ensure that the right answers will be elicited, or that even if they are, that this process of choice will be a straightforward one. However, not asking the right questions dramatically reduces the likelihood of eliciting the right answers in the form of appropriate policy responses. What, in our view, are the right questions, and derivatively, what is the right sequence of questions to pose with respect to any perceived problem that might possibly justify involvement by the state? We believe that there are four core, or basic, *tranches* of questions that should be posed. These relate, in sequence, to 1) the choice of policy objectives; 2) the choice of policy instruments; 3) the choice of administrative or institutional forum; and 4) the choice of decision-making processes within the chosen forum. We have sketched out these choices somewhat more fully in an appendix to this study.

With respect to the choice of policy objectives for any proposed form of state involvement or intervention in a class of economic or social activities, we believe that it is of crucial importance that policymakers identify the policy objectives to be served by state involvement or intervention with maximum clarity and precision, so that these objectives have a sufficiently "hard edge" to them that it is possible to engage in a discriminating initial choice of policy instruments to serve those objectives and to re-evaluate, over time, how well the chosen instruments are serving the chosen objectives. In our view, policy objectives for state involvement or intervention are likely to fall into the following three basic categories: a) economic (monopoly; externalities; and information failures); b) ethical (distributive justice; corrective justice; paternalism; and communitarian/collective moralisms); and c) political (rent creation, preservation, or enhancement for special interest groups).

With respect to each policy objective, a significant array of possible policy instruments are typically available and need to be evaluated comparatively, one against the other, in light of experience with their utilization both in this jurisdiction in the past and other jurisdictions currently or historically. That is to say, historical, comparative, and empirical evidence will be critical to the choice of policy instruments (or combinations of instruments). The efficacy of a

given policy instrument (which we reemphasize must be evaluated relative to available alternatives) can be assessed on two dimensions: 1) How completely does the instrument realize the chosen policy objective? and 2) What public and private costs are likely to be entailed in the deployment of this instrument? In many contexts, there will be a trade-off between these two dimensions of instrument performance. That is to say, an instrument may realize a given policy objective fully, but at very high public and private costs. Another instrument may realize the policy objective e.g. 80% but at much lower costs. Clearly in such cases choosing appropriate trade-offs between cost and effectiveness will be required. With respect to many policy objectives, dual sub-objectives will be relevant: a) how to reduce the incidence of the offending conduct or activity; and b) how to address the adverse consequences of residual forms of the conduct or activity in question, which in turn may implicate a combination of policy instruments. In addition, choices must be made as to whether to regulate or influence the supply-side or demand-side of the market and whether to regulate or influence inputs or outputs.

With respect to the choice of administrative or institutional forum for administering the chosen policy instrument, governments face basic choices between the direct administration of the instrument by a line department or agency of government; delegated administration by a statutory or administrative agency; delegated self-regulation by a professional or industry association; or private enforcement of civil entitlements through the courts. A variety of factors may legitimately bear on these institutional choices, such as routinized mass decisionmaking entailing significant economies of scale (bureaucracies); the need for specialized expertise, large stakes, and significant due process concerns (an independent agency); cohesive professional and ethical norms (self-regulation, subject to appropriate checks and balances); and private enforcement to vindicate corrective justice or related rights (the courts). Moreover, in some cases, it may be appropriate to conceive of a combination of regulation (however administered) and private enforcement (as in some of our case studies).

Finally, once 1) the policy objectives have been defined with appropriate precision; 2) the policy instruments to serve those objectives have been chosen; and 3) the choices have been made as to the administrative or institutional forum in which responsibility for administering the chosen instruments will be vested; policy choices must then be made as to the nature of the decision-making process within the chosen forum. In particular, choices are required as to the relative emphasis on case-by-case adjudication versus generic determinations of classes of issues; the relative weight to be given to full oral hearings in case-by-case determinations versus more informal determinations e.g. on the basis of written records; and the relative emphasis on high-quality initial decisions and subsequent appeal/reviews of initial decisions, and the nature and locus of subsequent appeal/review processes.

In short, before any role can be defined for, and assigned to, the civil justice system with respect to any perceived problem, rigorous analysis of each of these four *tranches* of choices is required. In making appropriate choices within each *tranche*, only limited progress is likely to be made through abstract analysis. Instead, what is required is serious attention to available empirical data ("taking the facts seriously") and historical and comparative experience.¹⁴¹ In many cases, ensuring that relevant data is systematically collected and analyzed may be a necessary prelude to rational policy choices. Moreover, particularly with respect to the last

¹⁴¹ See Don Dewees, David Duff and Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (New York: Oxford University Press, 1995).

three of the four central classes of issues (choice of policy instrument; choice of administrative or institutional forum; choice of decision-making processes), all choices should be thought of as relative to available alternatives, thus requiring a comparative institutional framework of analysis, which we have sought to emphasize throughout this study.

APPENDIX

STRUCTURING POLICY CHOICES

I. Asking the Right Questions

1. Policy Objectives
2. Policy Instruments
3. Administrative or Institutional Forum
4. Decisionmaking Processes Within the Chosen Forum

II. Choice of Objectives of State Involvement

A. Economic

1. Monopoly

e.g. telephones, electricity, natural gas

2. Externalities

e.g. environmental pollution; indigenous culture; pornography; third party safety (engineering) third party financial harm (accounting)

3. Information Failures (Asymmetries)

e.g. hazardous products; environmental effects; workplace hazards; weights and measures; food and drug composition

B. Ethical

1. Distributive Justice

e.g. rent controls; employment equity; pay equity; agricultural supply management; disparate risks to life and health; social insurance; administrative compensation

2. Corrective Justice

Targetted acts of wrongdoing that violate the equal moral agency or autonomy of others

3. Paternalism

e.g. minimum school leaving age; drinking age; drug or alcohol abuse; poor nutritional habits; lack of exercise

4. Communitarian/Collective Moralisms

e.g. cruelty to animals; prostitution; hate literature; defiling religious symbols; invidious discrimination; political campaign financing

C. Political

e.g. "Rent" creation or preservation; e.g. trade restrictions; entry restrictions (protectionism)

III. Choice of Policy Instruments

A. Economic Objectives

1. Monopoly — Instruments

- a. Do Nothing
- b. Government provision
- c. De-regulate/privatize
- d. Rate-of-Return regulation
- e. Price caps
- f. Auctioned franchises (e.g. TV licenses)

2. Externalities — Instruments

- a. Do Nothing
- b. Criminal prohibitions
- c. Civil liability
- d. Class Actions
- e. Licensing
- f. Command and control regulation (standards)
- g. Taxes or tradeable permits (incentive-based regulation)
- h. Information
- i. Administrative compensation

3. Information Failures — Instruments

- a. Do Nothing
- b. Information
 - i. Mandatory disclosure
 - ii. Government subsidies to information providers
 - iii. Government provision
- c. Civil Liability
 - i. Negligence
 - ii. Statutory civil liability
 - iii. Strict liability
 - iv. Class actions
- d. Quality/Safety Standards
- e. Administrative Compensation

B. Ethical Objectives

1. Distributive Justice — Instruments

- a. Do nothing
- b. Regulate prices/entry
- c. Subsidize supply or demand side
- d. Taxes (e.g. Injury taxes)
- e. Command-and-control regulation (standards)
- f. Social insurance
- g. Administrative Compensation

2. Corrective Justice — Instruments

- a. Private rights of action
- b. Private actions for Breach of Statutory Duty
- c. Class Actions

3. Paternalism — Instruments

- a. Do nothing
- b. Information/education
- c. Command-and-control regulation (standards)
- d. Government provision
- e. Taxes (e.g. Sin taxes)

4. Communitarian/Collective Moralisms — Instruments

- a. Do nothing
- b. Information/education
- c. Criminal prohibitions
- d. Supply side or demand side regulation

C. Political Objectives**“Rent” Creation and Preservation — Instruments**

- a. Do nothing (i.e. scepticism towards initial claims)
- b. Grandfathering
- c. Gradualism
- d. Buy-outs

IV. Choice of Administration or Institutional Forum

- 1. Direct Administration by government
- 2. Delegated: Independent statutory administrative agency
- 3. Delegated: Self-regulation
- 4. Private Enforcement: The Role of the Courts

V. Choice of Decisionmaking Processes Within the Chosen Forum

- 1. Case-by-case adjudication versus generic determinations (retail or wholesale justice)
- 2. Full oral hearings versus informal determinations on basis of e.g. written records (the “full court press” versus less formal case-by-case decision-making)
- 3. The extent of appeal/review procedures

TOPIC IV

THE ROLE OF THE COURTS IN THE RESOLUTION OF CIVIL DISPUTES

**THE ROLE OF THE COURTS IN THE RESOLUTION
OF CIVIL DISPUTES**

LORRAINE EISENSTAT WEINRIB

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THE ROLE OF THE COURTS IN THE RESOLUTION OF CIVIL DISPUTES

LORRAINE EISENSTAT WEINRIB¹

I. INTRODUCTION

(a) THE ISSUES

This paper discusses the normative role of courts in resolving civil disputes in Ontario. It considers the attitudes to court adjudication in a period of increased interest in alternative dispute resolution; the constitutionally mandated role of courts under the Canadian Constitution; and the institutional strengths of courts in delivering civil justice to the residents of Ontario. Finally, it considers the desirability of the blanket exclusion in Ontario of workers' compensation and human rights claims from the courts.

This paper is one part of a major study of the civil justice system in Ontario with a view to improving access to justice.² The major study takes in the broad sweep of civil disputes, engaging both private and public law.³ It includes matters that now come before superior and inferior courts, as well as administrative tribunals, as between individuals, between individuals and the state, and between individuals and regulatory authorities. The reference to individuals includes legal entities, such as corporations that also initiate and respond to disputes in the civil justice system. The range of disputes under review includes both private and public law claims.

The problems that prompt the study are more readily stated at large than analysed in their particularity. In his Study Paper entitled "Prospects for Civil Justice", prepared as the initiating document for this project, Roderick A. Macdonald observes:

... the perception that remedial justice is costly, slow and, on occasion, not well-attuned to solving the problems which are presented to courts for adjudication has also come to be widely shared by judges, lawyers, and court officials. Some jurists decry these failures and propose that greater resources should be put into the civil justice system. But others suggest that an expeditious and economical system of civil litigation may be fundamentally incompatible with the inherent values of the judicial process. They believe that maintaining the independence, objectivity and neutrality of the judiciary requires us to trade off the goals of efficiency and accessibility, to channel certain

¹ I would like to thank Caitlin Loynd and Julia Dryer for valuable research and editorial assistance.

² It is important to note at the outset that the study is directed at the civil justice system, to the exclusion of the penal or criminal functions of the justice system. Problems of access to court deliberations on civil issues cannot, however, stand apart from the criminal and penal caseload of the same courts. Any increased demand for the services of courts for either civil or criminal matters is a demand for the limited resources of the court system in the form of judges, courtrooms, support staff and funding.

³ R. Macdonald, "Study Paper on Prospects for Civil Justice", Ontario Law Reform Commission (1995) at 13 sets the following private law areas as the relevant focus: family law, real estate transactions, personal property, contracts, torts, succession, employment law, landlord and tenant, consumer law, insurance law, commercial law, agency and partnerships, corporate law [hereinafter Macdonald Study].

types of disputes away from courts, and even to limit the kinds of remedies that judges are permitted to award.⁴

These comments point to several of the challenging features of the project. First, the project seeks economic efficiency in the delivery of civil justice but lacks sound empirical data on caseload, costs, delay, access and result. It is now considered unwise to proceed without a detailed understanding of the problems:

Improving the civil justice system requires thoughtful, objective analysis based on sound empirical data. The lack of systematic, cumulative data in this area makes it possible for far-reaching policy proposals to be advanced on the basis of tendentious anecdotes and numbers. A bias in which solutions to perceived problems are developed by reference to unusual and atypical cases goes unchallenged. Not surprisingly, the effects of the resulting policies are often unanticipated.⁵

Second, Macdonald's comments leave unresolved the tension between the commensurate and non-commensurate values engaged, for example, between the idea of a court system that is expeditious and economical and one that is independent, objective, neutral and principled. Given the difficulty of collecting and digesting sufficient empirical material to provide a reliable basis for reform, it is not surprising that the incommensurables pose a difficult challenge. In addition, the current approaches to law in the academic literature, both in Canada and the U.S., tend to fall into theoretical patterns that do not look upon law and courts as distinctive or as superior to other modes of social ordering and institutional decision-making. Indeed, Professor Macdonald concludes, "...there are simply too many incommensurable features to predict anything. We don't know our categories; we don't know our data; and we *don't know our values*."⁶

Third, despite the obscurity of the problem and the importance of the varied and competing public and private values engaged, Macdonald's solution is to identify and off-load certain "types" of disputes to other dispute-resolution processes and/or reduce the remedial powers of some courts. These suggestions are accompanied by the acknowledgment that there is no evidence that reallocation would offer any but marginal relief and that any allocative principles engaged would likely come into conflict in their application to real cases.⁷ Moreover, his proposals have attracted a wide range of criticism from experts in the field.⁸

Considering the access to justice question in Canada, against the background of a dominantly American academic literature, creates an extra layer of complexity. Professor Macdonald highlights the perennial question of transferability for Canadian policy makers.⁹ He

⁴ Macdonald Study, *supra*, note 3 at 9, 14-20.

⁵ Galanter et al, "How to Improve Civil Justice Policy" (1994) 77 *Judicature* 185 at 185. This statement is of particular interest coming from leaders in the field of access to justice in the United States after decades of court reform projects.

⁶ Macdonald Study, *supra*, note 3, at 163. Emphasis added.

⁷ *Ibid.* Appendix V at 165-6.

⁸ *Ibid.* at 165-8 and 179-308.

⁹ National context is not irrelevant: "The great bulk of the English language literature on dispute resolution has been stimulated by specifically American concerns and perceived problems. The literature of social anthropology provides some powerful warnings about the complexity of social processes and their relationship to specific

notes that the disenchantment with the courts that permeates the access to justice movement in the U.S. coincides with an apparently opposite development in Canada: the 1982 adoption of the *Canadian Charter of Rights and Freedoms*, which presupposes the belief that “only adjudication before an independent judiciary can ensure justice”.¹⁰

Not surprisingly, Macdonald entertains only modest goals for the access to justice project, concluding that “because we are uncertain about what our problem or problems are, there is no obvious policy prescription for addressing them.”¹¹ Given this background of empirical ignorance and an unmanageable mesh of values, he recommends pilot projects addressed to specific problems, carefully monitored to produce a “reasonable degree of coherence over time”, rather than grand strategic planning. This caution is warranted for another reason as well. The reform projects in the U.S. illustrate the great difficulty of proceeding without more data, a clear set of coherent, compatible goals and some reliable method of evaluating improvement.¹² Moreover, earlier reform projects in a number of jurisdictions have shown that reducing the number of cases that go to the courts and increasing court capacity do not reduce court overload but rather make room for more cases to rise to the surface.¹³

The basic concern for *access* to the justice system breaks down into a multitude of exceedingly vexing, interconnected questions, some empirical, some normative: access for whom? access to what kind of dispute resolution mechanism? at what cost? cost to the individual? cost to the state? should there be one general or a number of specific rules for allocation of costs? access within what time frame? what tangible and intangible costs are created by delay? what benefits are generated by delay and for whom? what constitutes successful resolution of a civil dispute? Such questions in turn suggest a more specific range of questions: whom does (and should) the civil justice system serve best? those who experience a civil dispute that requires institutional resolution rarely, perhaps only once in a natural lifetime, or those whose personal or business activities produce such disputes regularly? what about undertakings that rely on the civil justice system as a publicly funded mechanism to deal with problems that they could, at greater private cost, avoid? should the system of civil justice offer one or many modes, or mixed modes, of dispute resolution to all who need it? if there are different or mixed modes, who makes the choice and at what stage? of what relevance is the monetary value of the dispute? the personal importance? the public importance? the jurisprudential importance? should the system treat the poor and the rich, the educated and the

cultural and historical contexts.” W. Twining: “Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics” (1993) *Mod. L. Rev.* 380 at 392.

¹⁰ Macdonald Study, *supra*, note 3 at 11. Macdonald does not make clear whether the critical, expert view attaches to private law cases while the popular view attaches to public law cases.

¹¹ *Ibid.* at 15.

¹² J.P. Esser, “Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know” (1988-89) 66 *Denver U. L. Rev.* 499.

¹³ G. Palmer, “The Growing Irrelevance of the Civil Courts” (1985) 5 *Windsor Y.B. Access Just* 327 at 335-6. New Zealand did away with personal injury torts but realized no reduction in caseload in the courts. Litigation seems to expand to fill, indeed overfill, capacity because cases move into the adjudication stage that might otherwise reach settlement due to delay that is unacceptable to the parties.

uneducated alike? what provision should there be for those who cannot express themselves (e.g., due to illness or disability) and for those who do not understand English or French?

While the access question is indisputably vexing and important, I propose in this paper to focus on the other part of the equation: the *justice* side.¹⁴ Here the concern is not the who", "how" or "when" of justice, but the "what": what is our understanding of justice within and beyond the legal system? what is justice in the context of a civil dispute? what are the special characteristics and criteria of a system of justice? how much is substance and how much is process? what is the special role of the courts in providing justice? are there basic components of our understanding of justice that are stable over time? how much do our ideas of justice evolve as social and economic ideas and conditions change? to what extent do reforms of one sort generate the need to create other reforms?¹⁵ what are the realistic possibilities of reform to increase access to justice? what provision should there be for resolving disputes of a type that arise in great number, affect the most basic arrangements in people's lives, but which raise no new, interesting or important legal issues? should there be different provisions for cases that involve solely monetary redress between strangers than for cases that involve restructuring long-standing relationships built on commerce, employment, residence, personal commitment or biological tie? what choices should people make in respect to the various kinds of dispute resolution methods? what relationship should there be between alternative methods and the courts of law? This paper does not take up this wide array of concerns but addresses, in the context of the legal system operative in Ontario, the allocation of dispute resolution to courts of law.

¹⁴ M. Cappelletti and B. Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) *Buffalo L. Rev.* 181 at 182: "The words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system... First the system must be equally accessible to all; second, it must lead to results that are individually and socially just." [hereinafter *Worldwide*] (This study stands as the General Report of a four-year research project based on 23 national reports and a series of studies.) See also R. Penner, "Access to Justice and Law Reform" (1991) 10 *Windsor Y.B. Access Just* 338 at 338: "... when we speak of access to justice, we are, generally, talking or writing rather less of substantive steps to the creation of the 'just society' ... and rather more of finding direct and affordable routes to a remedy for presumed wrongs, wrongs generally spoken of by lay persons as injustices".

¹⁵ M. Cappelletti and B. Garth, "Access to Justice as a Focus of Research" (1981) 1 *Windsor Y.B. Access to Just.* IX at xviii:

There is a growing body of literature showing that, despite the achievements resulting from legal aid reforms, public interest law, and other institutions that act as advocates for under represented interests, there are serious limits as to what they can accomplish on their own. Strong arguments, even if coupled with victories in courts and administrative agencies, do not necessarily produce lasting change for underprivileged groups. Lawyers and courts lack the resources and ability to see that victories are brought to the attention of potential beneficiaries and to monitor enforcement on a large scale. Implementation tends to require the active participation of private organizations able to educate their members, monitor the enforcement of rights, and where necessary, lobby in political forums on the strength of more than just the persuasiveness of their arguments. Recognizing this situation, leaders in the legal services and public interest movement are now urging that legal representation be seen as a means to preserve and strengthen private initiatives, not as a substitute.

Our courts are generally perceived to be overloaded, with attendant cost, to both the public and private purse, and inordinate delay. There are different ways of analysing the problem.¹⁶ Those who support the idea of diverting caseload from the courts into alternative dispute resolution systems address the problem to a certain extent on a quantitative basis, in terms of numbers of cases, cost of processing cases to resolution, and time spans, an approach that views litigation as “wasteful and disruptive”.¹⁷ On this view, progress in solving the problem of court overload will see the courts less burdened, most likely by the provision of extra-judicial dispute resolution for a large range of disputes classified as inappropriate for judicial determination. The alternatives to court adjudication are preferable on the assumption that the services they offer will be less expensive, faster and less formal. Others advocate alternative dispute services, such as mediation and arbitration outside the court system, on the understanding that these processes offer greater satisfaction to the parties in terms of both process (timely access, participation, informality) and result (for example, by effecting less damage to the ongoing relationship between the parties or providing a more stable resolution of the conflict). From a wider perspective, some would argue that alternative arrangements work to promote a stronger social fabric and/or a more progressive and redistributive agenda.

Those who resist the call to reduce the role of the courts, in contrast, read the indicia of overload differently, acknowledging the unique social and legal role of courts as institutions for vindicating rights. Here the problem of overload precipitates effort to maximize and equalize enjoyment of the unique features of court deliberation and adjudication. Access to courts, in which independent judges apply legal reasoning to legal questions raised in civil disputes, is considered a basic entitlement of citizens in a liberal democracy when private efforts to settle a claim fail. On this view, courts do more than resolve altercations: they set the rules of interpretation, provide authoritative interpretation of private documents and enactments of legislatures, develop the common law in both established and new areas of public and private concern, articulate the written and unwritten constitutional norms of the polity and assure the rule of law. For the vast number of “ordinary” cases that do not reach the courtroom, a complex and usually informal system of fact finding, mediation, compromise and negotiation encourages settlement.¹⁸ By engaging problem cases and novel issues, courts provide the operative norms and the mechanism for the authoritative application of those norms for much of our political, social and economic activity. And they do so when elected, representative legislative bodies fail to act or fail to provide adequate directives. On a more abstract understanding, the role of the courts is the institutional *sine qua non* for the rule of law.

This paper takes up the latter approach. First, the discussion sets out the divergent understandings of the civil justice crisis in the academic literature on access to civil justice.

¹⁶ F.E.A. Sander, “Alternative Methods of Dispute Resolution: An Overview” in M. Freeman, ed., *Alternative Dispute Resolution* (New York, New York University Press, 1995) at 97-99 sets out the four goals of the alternatives movement, noting that they are not necessarily consistent:

1. to relieve court congestion, undue cost and delay
2. to enhance community involvement in dispute resolution process
3. to facilitate access to justice
4. to provide more “effective” dispute resolution

¹⁷ R. Cranston, “What Do Courts Do?” (1986) 5 *Civil Justice Quarterly* 123 at 134.

¹⁸ F. Sander, “Alternative Methods of Dispute Resolution: An Overview” in Freeman, *supra*, note 16 at 98.

With that background in place, it turns to consider the constitutional framework for civil justice questions by examining the extent to which the Canadian Constitution mandates resolution of disputes in courts of law. The values underlying the constitutional rules, when looked at in conjunction with the values of civil justice reform, will provide the basis for considering two specific dispute systems now in place in Ontario, workers' compensation and human rights claims, as well as offering some suggestions, within the limits of the Constitution and the likelihood of effectiveness, for the reform project.

(b) BACKGROUND CONSIDERATIONS: HISTORY, THEORY AND ACADEMIC DEVELOPMENTS

Ontario comes to this study of access to civil justice with the opportunity to benefit from the work embodied in a decades-old international movement to study the justice system with a view to improving both access and justice. The literature produced by this movement delineates possible causes for the court overload experienced in many civil and common law jurisdictions since the Second World War. It also suggests a variety of ideas and concrete proposals by way of response. The largely American literature presents three different subject matter approaches: institutional, political and educational.¹⁹ The first has as its focus the assignment of the appropriate institutional design of dispute resolution to types of disputes, following upon the work of Lon Fuller.²⁰ The second, political discussion, attracts critics who apprehend disadvantage to the disadvantaged or who fear that the courts will lose their role in formulating public values.²¹ The third part of the literature provides material for lawyers who wish to acquire skills and techniques in alternate dispute resolution.²²

The access to justice movement has as its focus two features of the legal system: the idea of equal access and the idea of outcomes that are both individually and socially just.²³ Although the study of access to justice was initially the concern of those expert in the working of the legal system, it has now attracted the attention of sociologists, anthropologists, economists, political scientists and psychologists.²⁴ The multi-disciplinary engagement provides new insights for lawyers, judges and legal academics. However, it also creates the possibility of under-emphasizing or omitting features of the system intelligible to those who know it from within and see it as distinct from other social phenomena.

The significance of enlarged academic interest requires consideration of the origins of the access to justice movement. The movement arose in the rejection, in the early twentieth century, of the notion that civil justice preserved individual freedom, particularly economic

¹⁹ Twining, *supra*, note 9 at 380-81.

²⁰ L.L. Fuller, "The Forms and Limits of Adjudication" (1979) 92 Harv. L. Rev 353 (hereinafter "Adjudication") and "Mediation—Its Forms and Functions" (1971) 44 S. Calif L Rev 305 [hereinafter "Mediation"].

²¹ See S. Goldberg, E. Green and F. Sander, eds., *Dispute Resolution* (Boston: Little Brown, 1985).

²² Twining, *supra*, note 9, at 381. Skills are offered for activities such as counselling, interviewing, negotiation, mediation and non-curial advocacy.

²³ Cappelletti and Garth, "Worldwide", *supra*, note 14.

²⁴ *Ibid.* at 181.

freedom in a laissez-faire world. This notion of justice lost favour on the ground that such justice

... could be purchased only by those who could afford its costs, and those who could not were considered the only ones responsible for their fate. Formal, not effective access to justice—formal, not effective, equality—was all that was sought.²⁵

It was replaced by the idea of a more active state that offered an array of legal entitlements to support the new relationships spawned by the industrial revolution and urbanization, and the welfare state, for example, consumer protection, landlord tenant regimes, and workers' rights.

A comparative study of the interest in access to justice has found three historically sequenced waves.²⁶ The first wave had as its focus the provision of state funding to equalize access to the courts for those unable to pay, either through state payment to private lawyers (judicare) or provision of state-paid, salaried lawyers. This approach enlarged opportunity to resort to the courts but attracted criticism because the financial help afforded was inadequate to meet the need. There were, however, additional dissatisfactions: the system did not reach all the possible rights claims; it focused only on large, legal claims in courts and ignored a wider range of pressing claims and institutions; it depended on action by the disadvantaged, who were less likely to have the knowledge, skills and initiative necessary to secure the benefits afforded; it did not properly afford assistance for test cases for the development of new rights. Critics also attacked the basic premise of this approach, identifying it as too committed to the legal adversarial mode, with the result that it produced more formal than substantive change, privileged legal representation over less formal and less expensive possibilities, diverted attention from the possibility of needed political change, and deemed legal success as victory without attention to the need to apply, sustain and enforce such success.²⁷

The second wave responded to these critiques by going beyond funding access for the poor to the existing primarily private law system. The extended agenda recognized the need to support "public law" issues affecting "groups".²⁸ This wave led to changes to court procedures (including expansion of standing rules and the availability of class actions) and the provision of specialized administrative tribunals. Included in this wave were the U.S. civil rights revolution of the 1950's and 1960's, which promoted equality for those marginalized by race, religion and gender, and the growth of the administrative state, with its new forms of public decision-making by administrative tribunals.²⁹

²⁵ *Ibid.* at 183. This historical, worldwide account is not to be confused with the subject-matter organization of the American literature on access to justice referred to in the text at note 19. S. Silbey & A. Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject" (1989) 66 *Denver Univ. Law Rev.* 437 at 451.

²⁶ "Worldwide", *supra*, note 14 at 197-227. I prefer this comparative historical treatment to others that have a narrower national outlook. See, for example, F. Sander, "Alternative Methods of Dispute Resolution: An Overview", *supra*, note 16 at 97-98.

²⁷ See M. Galanter, "The Duty Not to Deliver Legal Services" (1976) 30 *U. Miami L. Rev.* 929 and D. Trubek, "Review of Balancing the Scales of Justice: Financing Public Interest Law in America" (1977) *Wis. L. Rev.* 303, cited in "Worldwide", *supra*, note 14 at 142.

²⁸ A. Chayes, "The Role of The Judge in Public Law Litigation" (1976) 89 *Harv. L. Rev.* 1281.

²⁹ Silbey & Sarat, *supra*, note 25 at 450.

While the access goals of these initiatives met some success, the difficulties of judicial administration of the civil rights injunction raised new problems, straining the resources of courts and undermining their legitimacy in the eyes of many critics. The administrative tribunal process proved expensive, formal, dependant on legal and other experts, and time-consuming and, in the eyes of critics, often prone to favouring the interests that were to be regulated and constrained.

The third wave of access to justice has taken yet a wider approach, in terms of institutions, issues and constituency. This approach:

encourages the exploration of a *wide variety of reforms*, including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modification in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go much beyond the sphere of legal representation.³⁰

Here we see a reform agenda of a more radical character. The third wave grew initially outside the world of academic law in the writings of social scientists who came increasingly to set the agenda.³¹ This approach aims at more than equalizing access to legal services through legal aid and broadening entitlement and process beyond the two-party litigation of private law suits in the courts or the multi-party deliberations of administrative tribunals. It seeks to transform the "justice industry" by having it offer "a far more variegated line of products in far greater quantity... to a far greater variety of markets with a far greater consumption potential than previously appreciated".³² The point of this approach is not to accord appropriate process and substantive law for legal disputes, but to address conflict in society at large.

Two modes of reform are envisaged. The first works to reform the overloaded court system from within through support services and the provision of alternative dispute resolution procedures, such as the multi-door courthouse in which disputes are distributed according to type to the appropriate dispute resolution process.³³ The second involves diversion of disputes away from the court system, in which legal process and analysis work to the perceived detriment of the parties and the social fabric, by assessing fault on established legal principles and assigning individual blame.³⁴ The core idea underlying this program of diversion is the conceptualization of the dispute as a rupture of social relationships, to be processed so as to sustain the social nexus in which it arose, including to some extent the personal relationship between the disputants. The new approach is supposed to lead to consensus, to constrain future

³⁰ "Worldwide", *supra*, note 14 at 225.

³¹ A. Sarat, "The 'New Formalism' in Disputing and Dispute Processing" (1988) 21 Law and Soc. Rev. 695.

³² E. Cahn and J. Cahn, "What Price Justice: The Civilian Perspective Revisited" (1966) 41 Notre Dame Law. 927 at 941 and 947.

³³ G. Kessler and L. Finkelstein, "Evolution of Multi-Door Courthouse" (1988) 37 Cath. U. Law Rev. 77.

³⁴ "Worldwide", *supra*, note 14 at 228; Esser, *supra*, note 12 at 506; Silbey & Sarat, *supra*, note 25 at 452.

conduct, to achieve social stability and co-operation by strengthening bonds between people often through community involvement.³⁵

The challenge for the diversion approach was to classify disputes, hiving off from the courts those cases that other institutions and processes would better oversee. Drawing loosely on Lon Fuller's work on adjudication, mediation and negotiation as the paradigm, the approach presupposed that the features of disputes, the modes of deliberation as well as the disputes themselves were sufficiently stable to support a viable classification system.³⁶ This idea of classification, and its projected economies, goes by the label "the new formalism".³⁷

While Fuller's work appears to be the starting point for this approach, the extent to which it would have met his approval is not clear. He too understood adjudication as a "form of social ordering" that settles "disputes or controversies", between parties by settling their future relations and those of others who might pose the same question.³⁸ But he stressed that social order depends on a "rational core" to preserve human institutions³⁹ and that it is adjudication that "gives formal and institutional expression" to the influence of reasoned argument in human affairs.⁴⁰ Adjudication is a concentrated form of this exercise in reason:

...the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication towards its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication.⁴¹

This reasoning is of a particular type—it is based on claims of "right and accusations of guilt."⁴² To Fuller, it is the activity of adjudication that fulfils this prerequisite, not the type of the dispute itself:

It is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that *whatever* they decide, or *whatever* is submitted to them for decision tends to be converted into a claim of right or an accusation of fault or guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function. ... A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact that the latter rests upon some principle.⁴³

³⁵ Silbey & Sarat, *supra*, note 25.

³⁶ *Ibid.* at 448-9.

³⁷ See *supra*, note 31.

³⁸ Fuller, "Adjudication", *supra*, note 20 at 357.

³⁹ *Ibid.* at 360-1.

⁴⁰ *Ibid.* at 366.

⁴¹ *Ibid.* at 364. Fuller gives insanity, bribery, and prejudice as examples where participation is vitiated.

⁴² *Ibid.* at 368.

⁴³ *Ibid.*, at 369.

Fuller illustrates the conversion of a simple claim to a claim of right in the example of an employee who may ask his boss directly for a raise on the basis of generosity, charity or bargaining but, within an adjudicative framework, must make a claim of right, e.g., based on the principle of equal treatment of fellow employees.⁴⁴

Fuller does not take the view that all disputes or claims are candidates for conversion to claims of right: adjudication is inappropriate as a form of social ordering “where the effectiveness of human association would be destroyed if it were organized about formal, defined ‘rights’ and ‘wrongs’”, for example agreements between spouses as to the internal organization of family life or running a coal-mining undertaking.⁴⁵ Adjudication is unsuited to such activities to the extent that they require “spontaneous and informal collaboration” for an evolving series of tasks, but—and this is an important but—adjudication may in such circumstances “declare certain ground rules applicable to a wide variety of activities”.⁴⁶ He accounts for this distinction in these words:

...the incapacity of a given area of human activity to endure a pervasive delimitation of rights and wrongs is also a measure of its incapacity to respond to *a too exigent rationality*, a rationality that demands an *immediate and explicit reason for every step taken*.⁴⁷

This interstitial rationality need not build on “rules formally declared or accepted in advance.”⁴⁸ The example he offers is federalism, where the courts oversee a process by which the law works itself pure, tracing out “the full implications of a system”, elucidating the meaning of the parts and their inter-relationship in a “harmonious and consistent whole.”⁴⁹ He makes clear that courts are not merely capturing or reflecting current societal values, nor simply working through empirical fact accumulation or by way of logical deduction. Rather, they are “active ... in the enterprise of articulating the implications of shared purposes”, a task that involves “reorganization and clarification of the purposes” that constituted the starting point of the inquiry.⁵⁰ The example of federalism posits adjudication as an appropriate judicial task, not in elucidating or applying stated or imported rules of general character, but in articulating the internal coherence of the collaborative undertaking at points of disputed meaning.

Essential to the judge’s task as adjudicator is an effective adversary process, a process that presents “intelligent and vigorous advocacy on both sides” and promotes the impartiality of

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 370-1. Domestic agreements that courts now enforce do not detract from the example. They establish ground rules when problems have arisen and provide the level of detail necessary to preserve the relationships based on principles. See text at note 63, *infra*.

⁴⁶ *Ibid.* at 371.

⁴⁷ *Ibid.* at 371. Emphasis added.

⁴⁸ *Ibid.* at 377.

⁴⁹ *Ibid.* Fuller quotes Alexander Hamilton, in Federalist No. 82, for this image of part-to-part and parts-to-whole coherence.

⁵⁰ *Ibid.* at 378-81.

judgment.⁵¹ At the end of the task it is optimal for the adjudicator to provide reasoned decisions in order to assure the parties that the reasoned arguments and proofs presented on their behalf entered into the reasoned deliberation and also to serve as a guide to whatever continuing relationship the parties may have.⁵² Thus, in Fuller's system, one understands adjudication from the point of view of the parties and their participation in the process, in service to the rational core of human institutions and relationships.

When he turns to the limits of adjudication, Fuller returns to the idea of the transformative tendency of adjudication to infuse claims with rationality in the form of reasoned arguments and proofs. Not all claims survive this process. Unamenable to adjudication are those problems that have "significant and predominant" polycentric features,⁵³ with the proviso that "there are polycentric elements in almost all problems submitted to adjudication."⁵⁴ His examples of predominantly polycentric problems, as exceptions to the general application of reasoned analysis, are quite limited, leaving a wide area of operation for adjudication.⁵⁵ Thus, adjudicative oversight of a federal system of government and providing the rules for the functioning of an economic market on the basis of free exchange,⁵⁶ concededly deeply polycentric concerns, fall expressly within his adjudicative model, subject to reasoned arguments and proofs. Moreover, adjudication provides a framework that may influence some of the polycentric elements of other problems that do not come to the courts.⁵⁷

Attempts to create a classification system for those issues that should go to courts and those that should not, based on Fuller's work, proved elusive to those seeking to implement the insights of the third wave of access to justice. Perhaps this failure is due to the fact that little heed was paid to Fuller's understanding that there is a wide overlap between problems suitable for adjudication and other methods, that purely polycentric problems wholly inappropriate for adjudication are rare, and that adjudication can set the rules for a large body of individual questions that are not in their multiplicity amenable to adjudication.

Some commentators, for example, read Fuller's narrow category of polycentric cases unsuitable for adjudication much more widely than he described them and proposed instead a narrow range of cases suitable for adjudication. In effect, Fuller's nominal categories were retained but his insistence on adjudication as the source of reason for the ongoing rationality of human interaction was lost in the proposal that courts were the appropriate forum for a limited range of cases involving one-shot, zero-sum, bipolar disputes, such as adjudication of test

⁵¹ *Ibid.* at 384.

⁵² *Ibid.* at 388.

⁵³ *Ibid.* at 398.

⁵⁴ *Ibid.* at 397.

⁵⁵ *Ibid.* at 394ff. Fuller provides examples of "many centred" problems with a complicated distribution of tensions from these multiple centres: dividing a miscellaneous collection of paintings into equal shares; setting wages and prices; assigning football players to playing positions

⁵⁶ *Ibid.* at 403.

⁵⁷ *Ibid.* at 398.

cases that attempt to define new legal rights and relationships.⁵⁸ The corollary to this proposal was the view that cases in which it was necessary to preserve interdependent relationships were ill suited to the adversary process leading to adjudication in courts of law.⁵⁹ Another view was that the regular courts should do the work of “enforcement and development of both new and old rights, especially “public law litigation”, i.e., the litigation of constitutional values. Courts thus were the appropriate bodies to implement “diffuse interests in the aggregate”, relying on highly trained lawyers and costly expert witnesses and evidence but were relieved of the task of enforcing “ordinary people’s rights at the individual level”.⁶⁰

The idea of distinguishing ordinary cases involving application of existing law from test cases is attractive, until one reflects upon the difficulties of classification. Cases that push the law forward, by bringing a fact situation that shatters the propriety of the existing rule or interpretation or that illustrates changes in the world that require a legal response, do not necessarily initially present themselves as such. Often the issues do not crystallize until the second or third level of hearing. On occasion, it is the judge and not the lawyers or parties who recognize the case’s potential. Transformational cases are sometimes discerned only after judgment is rendered, sometimes only long after. For some issues, change will come only after a series of cases, all of which were necessary to effect the change but only the last of which will benefit by it in result. Sometimes losing a case or a series of cases is the catalyst to legal change—in the legislatures. The legal system is not one that makes much sense, until after the fact:

It may well be that when lawyers deviate from strict utilitarian caution, from the client’s point of view, they further wider social interests. The legal system would in the long run become unable to draw the finer distinctions between right and wrong if there were no attorneys who dared to bring even dubious cases before a court of law, but always preferred compromises. It is also in the interest of the legal system and its general functions that lawyers should not unswervingly attempt to adjust to probable court decisions, like meteorologists adjusting to the weather. The law is continuously moulded through attempts to change the status quo, although this may in the individual case be irrational from a strict minimax point of view.⁶¹

It also proved difficult to arrive at generally accepted classifications for specific types of cases. Custody battles, for example, are considered relational and for that reason inappropriate for the courts by some⁶² and, by others, the prime type of case where courts are the proper

⁵⁸ See references in “Worldwide”, *supra*, note 14 at note 148 and R. Cavanagh & A. Sarat, “Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence” (1980) 14 Law & Soc. 371 at 403 and 394-95: “Courts ... are best equipped to deal with disputes involving questions of financial compensation for grievances that (1) find their *primary* locus in a breach of legal duty, and (2) can be ended effectively by a judgment identifying the party at fault and fixing damages. Courts require people to frame social problems as problems of legal rights and to seek an authoritative determination of blame.”

⁵⁹ A. Sarat & J. Grossman, “Courts and Conflict Resolution: Problems in the Mobilization of Adjudication” (1975) 69 Am. Pol. Sci. Rev. 1200 at 1210.

⁶⁰ “Worldwide”, *supra*, note 14 at 239. This proposal would seem to undermine Fuller’s view that rationality lies at the core of human institutions and relationships and for that reason the dispute resolution process should engage the participation of ordinary people and ordinary problems on the basis of reasoned argument and proof.

⁶¹ V. Aubert, “Courts and Conflict Resolution” (1967) 11 Journal of Conflict Resolution 40 at 45.

⁶² Cavanagh & Sarat, *supra*, note 58 at 394-403.

forum, on the ground that such conflicts engage “dichotomous rights and duties” and indivisible subject matter.⁶³

There is considerable current criticism of these earlier efforts at classification. Some commentators take the view that this approach ignores the fact that disputes are both created and shaped by the institutions designed to respond to them as well as the process by which they are carried forward. Moreover, dispute processing methods, such as mediation, arbitration and adjudication, are neither completely delineated nor wholly stable: they vary from professional to professional and adapt to the disputes before them.

More focused criticism of projects implementing such classifications suggests deeper problems. Qualitative evaluation has proved elusive and even quantitative analysis unreliable—and this is a grave failing for projects put in place to alleviate volume overload and to reduce delay, cost and inefficiency. Data from dispute-resolution projects designed to measure increased efficiency has proved difficult to evaluate. Noticeable, however, is the tendency for publicly supported alternative dispute resolution to come to service the low income tier of the population, while a more professionalized, expensive set of user-pay funded arrangements service high-end business disputes.

One critical commentator found that satisfaction is lower for disputants to whom the alternatives may appear to be mandated second-class justice.⁶⁴

ADR is usually justified by the congestion of the courts and the demand placed upon them by ordinary persons. The overuse of the courts to resolve family, neighborhood, and other “minor” problems is often blamed on the breakdown of community and the erosion of authority of home, school, religion, and other institutions. Yet there is no clear evidence that the backlogs plague the lower courts; instead, they seem to occur largely in the higher courts. Proponents of the notion that the courts are too congested, and therefore that new alternatives are necessary, may be responding to the presence of new users in the courts who are considered undesirable and who present frustrating and unrewarding problems—people making claims about domestic violence, neighborhood harassment, sexual harassment on the job, discrimination, faulty goods, shoddy medical service, and deteriorated rental housing. These users are making difficult demands for protection from the courts. Their use of legal institutions, however, is a response to the new legal entitlements of the 1960’s and to the expansion of access to the courts produced through the vigorous legal services and legal advocacy of the same period. More rights were created and more people were invited to use the courts to claim these rights, including women, minorities, prisoners, workers, and consumers. ... ordinary people go to court because they have an understanding of themselves as endowed with rights and entitled to the protection of the state against intolerable harassment and attacks by spouses, friends and neighbors. Yet they go reluctantly, after a prolonged period of difficulty, and only as a last resort. They ... have heard the message that they, too, are members of American society, entitled to benefit from its legal system and the services it offers. ADR invites these people out of the courts and encourages them to use alternative dispute resolution processes. Further, it provides an ideological justification for sending them away because their problems are defined as “inappropriate” for legal forums.⁶⁵

⁶³ Aubert, *supra*, note 61 at 46.

⁶⁴ S. Merry, “Disputing Without Culture” (1987) 100 Harv. Law Rev. 2057 at 2067.

⁶⁵ *Ibid.* at 2072-3.

A recent study applies a similar critique to mediation of custody disputes and concludes that while the family court system produces neither "just results" nor respectful and humane treatment to participants, mediation as an alternative does not remedy these ills:⁶⁶

...mandatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfil its promises. In particular, quite apart from whether an acceptable result is reached, mandatory mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be... If two parties are forced to engage with one another, and one has a more relational sense of self than the other, that party may feel compelled to maintain her connection with the other, even to her own detriment... Thus, rather than being a feminist alternative to the adversary system, mediation has the potential actively to harm women. ...Some of the dangers of mandatory mediation apply to voluntary mediation as well. ... Entering into such a process with one who has known you intimately and who now seems to threaten your whole life and being has great creative, but also enormous destructive, power.⁶⁷

The author, who is an experienced mediator, regrets the movement away from inquiry into past responsibility, if not fault; notes dissatisfaction with the absence of any language of rights and entitlement; comments on the prevalence of bias and personal dislike that can arise in mediation; and recognizes that lawyers are effective in protecting rights and insulating the parties from the abrasive experience of direct dealings with each other as well as with the mediator. These comments echo Fuller's insistence on rationality as the mode of analysis for framing even domestic questions and adjudicative process as appropriate to the rationality standard.

A more broadly-based critique is to be found in a study by John Esser of the literature evaluating dispute resolution projects.⁶⁸ This study suggests that the basic idea informing the third wave of access to justice—matching types of dispute-processing to types of disputes in order to save time and expenditure—may be too restrictive as a hypothesis for evaluating the success of dispute-resolution projects. Despite the fact that this understanding is widespread, under the banner "the new formalism", it is at present only a social science hypothesis that may prove unsound altogether or simply too undeveloped to provide a basis for sound empirical confirmation. It may, however, work to foreclose discovery by researchers of possibilities that would achieve greater efficiency and effectiveness. As Esser states:

While our framework helps us to systematize our understanding of the data which our questions deem significant, it also diverts us from making other observations which may have as great, if not greater, significance for our knowledge of dispute processing.⁶⁹

⁶⁶ T. Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L. Rev. 1545. See also M. Fineman, "Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking" (1988) 101 Harv. L. Rev. 727, and R. Delgado et al., "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) Wis. L. Rev. 1359.

⁶⁷ Grillo, *supra*, note 66 at 1549-50.

⁶⁸ Esser, *supra*, note 12.

⁶⁹ *Ibid.* at 502.

The system of matching dispute resolution method to type of dispute requires a typology of both. Esser provides the following lists:⁷⁰

mechanisms:	adjudication, arbitration, mediation, negotiation
hybrid mechanisms:	private judging neutral expert fact finding mini-trial ombudsman summary jury trial
type of disputes:	relationship between the disputants (ongoing or not) nature of dispute (polycentric, novel) monetary value at stake speed of processing dispute cost of processing dispute power relationship between the parties

Unfortunately, such a typology, which would at least provide an early common foundation for analysing projects, and the basis for further defining more intelligible and/or more stable categories, has not been consistently taken up.

But even assuming systematic classification, these categories may simply be inadequate. Esser provides an intriguing example. A study that finds arbitration to be time-saving may not easily yield up the precise reason for producing that result. Arbitration has numerous variations and fits into such a multitude of contexts within the legal system that one needs a finely tuned instrument of analysis to read what is meaningful from the available data. It may be, in the example given, that it was not the requirement of arbitration *per se* that compelled early settlement and therefore a shorter time frame for resolution of the dispute, as much as the rule, which was wholly unrelated to the requirement of arbitration as a mode of dispute-resolution, that advanced and compressed the time frame for the parties to prepare their cases for arbitration. Early settlement, and the time it saved, in other words, were the product of the rule mandating an early date for arbitration, which imposed high expenditure for preparation on the parties as a front-end cost. The aggregate reduced time was therefore a function of a procedure that arbitration *per se* did not impose.⁷¹ Such careful reading of project results is particularly important because the projects are not yielding the data that, according to the “new formalist” premise, they were designed to yield.⁷²

Even if one grants the premise of matching process type to dispute type, the methodology of the studies appears unreliable because the desiderata of reduced time, cost-saving, and fairness, register no “absolute measure” of effectiveness.⁷³ While some studies, for example, read decreased average case duration as a saving in *cost*, others find a saving in *time*. One study reads increased duration as an indicator of increased “judge time”, hence an increased measure of *fairness*. Other more abstract desiderata would prove even more resistant to precise calibration: maximizing the permanence of the dispute resolution; providing greater

⁷⁰ *Ibid.* at 521.

⁷¹ *Ibid.* at 540-01.

⁷² *Ibid.* at 531.

⁷³ *Ibid.* at 527 and 538-9.

satisfaction to the parties; providing more fair and equitable processing; strengthening the community.⁷⁴

Esser takes up these more difficult questions of evaluation in noting that the projects premised on the "new formalism" should demonstrate maximization of fairness and equality. Troublesome is the finding, therefore, that middle and higher income earners seek their fairness and equality in the adversary system while poor people use the alternative dispute mechanisms. The view that disputes find their resolution mechanisms according to economic class undermines a more generic understanding of disputes and their appropriate resolution-mechanisms premised by the social scientists. Some people objected to random allocation of cases to judicial or to alternative processing, because they felt their rights were at risk.⁷⁵

The widespread perception of the current inadequacy of diversion to realize the goals envisaged, even cost savings, does not mark the end of the impetus to reform the legal justice system. Perhaps what these recent critical insights demonstrate is that the court system was not properly or adequately transformed to absorb the added workload produced by the changes embodied in the first and second wave and that the third wave's response to the overload produced—moving a large body of the traffic away from adjudicative resolution—ignores both the strengths and the centrality of adjudication in our legal system and beyond.⁷⁶

That court overload is acute and that there is need for reform is evident. It is important, however, now that the third wave has demonstrated theoretical, empirical and operational weaknesses, to try to envisage the next stage. One way of moving forward is to examine the premises of the third wave more closely.

The preference for alternative dispute resolution tended to misconceive the nature of the court process. In terms of process, it failed to see that to a considerable extent the processes that were considered new and alternative to the court system already had some, albeit not optimal, operation within that system, with the result that very few civil disputes actually reached the courts. Providing other, but not necessarily more effective, ways to access these processes might not create greater efficiency or reduce cost—the result might in fact be the opposite.

Social scientists criticized the court system for directing its resources to a misguided "quest for fault", and for being absorbed in the adversarial impulse to assign blame or guilt for past acts at the expense of the trust, reconciliation and healing necessary to maintain the bonds between individuals and the networks of community in the future.⁷⁷ They also made assumptions about classification that have turned out to be misconceived and unreliable as a basis for change. Missing here was the understanding that it is through fault-finding that courts, on a case by case basis, provide the framework against which mediation, negotiation, arbitration, and conciliation operate. This effect, variously termed the shadow effect of the

⁷⁴ *Ibid.* at 525.

⁷⁵ *Ibid.* at 537.

⁷⁶ See Merry, *supra*, note 64.

⁷⁷ Silbey & Sarat, *supra*, note 25 at 452ff, referring to Cahn & Cahn, "What Price Justice: The Civilian Perspective Revisited" (1966) 41 Notre Dame L. Rev. 927, 932.

law⁷⁸ and the radiating quality of law,⁷⁹ provides the normative values and rulebook for resolution of a myriad of disputes that no one ever contemplates taking into the court system. As Fuller made clear, it is this background presence that underwrites a system of rights and, by extension, the rule of law. Even in arguing the irrelevancy of the courts, G. Palmer signals their indispensability:

The courts are really remote from the functioning of the system. They stand in wait as the *ultimate supervisor of standards*. But down at the workplace with my constituents we never think of them. They are irrelevant.⁸⁰

Beyond the dormant normative frame provided by established rules, the courts also embody one of the mechanisms by which the legal system forges new rules and, as necessary, new norms as societal change requires—most importantly, perhaps, when legislatures can't, won't or fail in their efforts to provide a needed legal framework.⁸¹ These legal developments build on the disputes that are brought to court. If one recognizes that disputes provide the basis on which law grows, one can regard disputes not as symptoms of societal or inter-personal disfunction, but as the product of normal interaction and development on both a personal and societal level.

To think about law in this way is to work to define “the space of law in society”, not to deal with social ills at large through law or through courts of law.⁸² The example of debt recovery in informal courts of limited jurisdiction illustrates this point.⁸³ As Cavanagh and Sarat point out, it was considered progressive to provide the “ordinary person” with this informal forum for adjudication of consumer and tenancy claims, which were seldom defended in the ordinary court system. Over time, however, these courts came to be understood to benefit landlords and creditors by providing an easy mechanism for debt collection at state expense.⁸⁴ Too easy—because tenants and debtors still failed to appear, even where defences

⁷⁸ R.H. Mnookin & L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale L.J. 950.

⁷⁹ M. Galanter, “The Radiating Effects of Courts”, in K.O. Boyum, L. Matther, eds, *Empirical Theories about Courts* (New York: Longman, 1979) at 117. At 121: Courts provide “a backgrounds of norms and procedures, against which negotiations and regulation in both private and governmental settings take place...[they] communicate not only rules that would govern adjudication of the dispute but also possible remedies and estimates of the difficulty, certainty, and costs of securing particular outcomes”. In effect, parties acquire a basis on which to interact as parties. At 127: “Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls.”

⁸⁰ Palmer, *supra*, note 13 at 343. Emphasis added.

⁸¹ In this category one can include: abortion, obscenity, reproductive technologies; end of life questions such as refusing treatment, discontinuing treatment, palliative care.

⁸² Silbey & Sarat, *supra*, note 25 at 438, referring to O. Fiss, “Against Settlement” (1984) 93 Yale Law J. 1073, which stands as the prototype of this position.

⁸³ Cavanagh and Sarat, *supra*, note 58, at 388-394.

⁸⁴ Quebec's exclusion of corporate claims from its small claims courts avoided this result. In Manitoba, in contrast, small claims courts gave access to inexpensive adjudication for individual plaintiffs but gave greater benefit to public utilities, department stores and debt collection agencies. R. Penner, “Access to Justice and Law Reform”, (1990) 10 Windsor Y.B. Access Just 338 at 346.

were available. This pattern is ascribed to a number of causes including poverty, lack of education, ignorance of available defences, lack of ability and willingness to present one's position, and marginalization of visible minorities. Some reforms to remedy this situation were designed to improve the adversarial quality of the hearing to facilitate a just decision (e.g., require plaintiffs to establish their case on a *prima facie* basis before securing a default judgment, provide paralegal support and information about legal aid and legal advice). The object of these was to "increase the competence or capacity of courts to make accurate determinations and fair decisions"⁸⁵ but in effect they would likely increase the workload of the courts as well. Other reforms went in the opposite direction, removing large numbers of cases from the courts by restricting claims to a certain number per plaintiff, barring use of the courts as collection agencies, and barring corporate and insurer claims.⁸⁶ These reforms also proved unsatisfactory, because creditors cut back and increased the cost of credit and landlords increased rents and reduced housing supply. These larger economic consequences reduced the workload of the courts but without improving access to justice. This example illustrates the complexity of the workload and access to justice questions and also suggests that the question of the space of law in society is one that must be looked at conceptually and over time with great attention.

In the United States, Owen Fiss is one of the few who has championed the distinctiveness of law and the function of courts building upon Lon Fuller's work. It is informative to consider his ideas carefully because they are the most developed in this tradition. They are, as we shall see, however, firmly rooted in the American experience and, in particular, the constitutional developments of the past 50 years. Their conceptual richness is nevertheless of great interest but the transferability to Canada of ideas so rooted in their particular context must be carefully considered.

In his celebrated article "Against Settlement", Fiss argued that *justice* is eclipsed in the settlement situation, where the weaker party, against her interest, is prone to succumb to the pressures to settle exerted by the stronger party. In his view, disputes require adjudication to assure justice. He takes this view, in part, because it does not make sense to favour settlement or reconciliation for parties who go to the courts, not by preference, but because they have no other recourse for justice. While it is true that litigation entails high cost for these people, their turning to the courts demonstrates that the cost of injustice is higher.⁸⁷

Fiss in effect holds allegiance to the second wave of access to justice movement, the enlargement of the world of legal claims to include the public law entitlements of groups, particularly vulnerable minorities defined by personal characteristics such as ethnicity or race, or disability, or political powerlessness.⁸⁸ He sees the judge as the neutral third party, able to "lessen the impact of distributional inequalities"⁸⁹ and to provide a "conceptual and normative distance" between the courtroom argument, which may not fully or adequately represent the

⁸⁵ Cavanagh and Sarat, *supra*, note 58 at 393.

⁸⁶ Macdonald suggests barring corporations as plaintiffs in small claims courts, see "Macdonald Study", *supra*, note 3 Appendix V.

⁸⁷ O. Fiss, "Out of Eden" (1985) 94 Yale L. J. 1669 at 1670-1.

⁸⁸ "Against Settlement", *supra*, note 82 at 1079. See also *supra*, text at note 28.

⁸⁹ *Ibid.* at 1077.

group interests engaged, and the ultimate result and reasons for judgment.⁹⁰ The role of the judge is a broad public function:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.⁹¹

Far from seeing the judge as exercising an isolated decision-making authority over parties who would henceforth part company, Fiss advocates use of the structural injunction, a remedial technique that sees the judge retain jurisdiction over the institution found to infringe constitutional guarantees in order to oversee its transition to compliance, a process that has, in some situations of racial discrimination, taken decades.⁹² Public norm creation and realization of this kind is polycentric, but appropriate, work for judges—despite Fuller’s injunction to the contrary—because Fuller’s world was one where individual participation in rational argument sufficed. In our world, where it is social hierarchy rather than the market that undermines shared values, Fiss argues, “what is needed to protect the individual is the establishment of power centres equal in strength and equal in resources to the dominant social actors; what is needed is countervailing power.”⁹³

For Fiss, private dispute resolution is a consequence of the judicial function, which is to elaborate the meaning of public values.⁹⁴ Accordingly, private disputes that do not engage such values may go to private arbitration, where the parties pay for and choose the decision-maker.⁹⁵ Here again, he diverges from Fuller. Closer to Fuller, however, is Fiss’ view that statutory entitlements within the discretion of state officers should be the subject of judicial oversight based on reasoned elaboration of public values, and not passion or instrumental values.⁹⁶

Consistent with this view of the activist, normative role of courts and legal analysis, Fiss rejects the approaches of both law and economics and critical legal studies. He states, “We need public morality to have law, true, but even more, we need law to have a public morality.”⁹⁷ Fiss does not define public values and public morality very clearly, preferring to point to their operation within the legal system: “The task of the judge is to give meaning to

⁹⁰ *Ibid.* at 1080.

⁹¹ *Ibid.* at 1985.

⁹² *Ibid.* at 1983.

⁹³ O. Fiss, “The Forms of Justice”, (1979) 93 Harv. L. Rev. 1 at 36 and 43-44.

⁹⁴ *Ibid.* at 30.

⁹⁵ *Ibid.*

⁹⁶ O. Fiss, “Reason in all its Splendor” (1990) Brooklyn L. Rev. 789.

⁹⁷ O. Fiss, “The Death of the Law?” (1986) 76 Cornell L. Rev. 1 at 15.

constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just. He does not become a participant in interest group politics.”⁹⁸ Elsewhere he identifies public values with specific constitutional guarantees, such as equality, liberty, due process and free speech, or with new norms.⁹⁹

These public values work to “define our society and give it an identity and coherence”, something above and apart from “private ends.”¹⁰⁰ Thus, Fiss sees in the movement from the second to the third wave of access to justice *a crisis as to the existence of public values, not a question of institutional competence*.¹⁰¹

Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason. What we need at the moment is not another assault on this form of public power, whether from the periphery or the center, or whether inspired by religion or politics, but a renewed appreciation of all that it promises.¹⁰²

While similar concerns about “the space of law in society”¹⁰³ present themselves in Canada, as noted earlier, one must sound a note of caution in respect to the transferability of some of the American experience and academic literature. The access to justice concerns play out within the U.S. legal system in ways that are markedly different from the Canadian system. The American court system has departed in a number of ways from the model of courts as providing legal analysis to resolve the two party dispute presented. For example, in administering justice as between private parties, e.g., in claims in tort, American judges have invoked distributive considerations to a far greater extent than their Canadian counterparts. The Canadian justice system has not had to take up this role, in part because legislatures have been more forthcoming in providing redistributive or insurance schemes, e.g., universal medical insurance, no fault motor vehicle accident coverage.¹⁰⁴ Litigation is encouraged in the U.S. by the availability of contingency fee litigation, class actions, punitive damages and large jury awards for pain and suffering.

The public law role of courts—that Professor Fiss emphasizes as the role of the courts in proclaiming public values—also has a distinctive place in American law. When Fiss decries the prospect of taking matters out of the courts, he cites the decisive role of the courts in redressing the failure of the United States political system to disband the system of racial apartheid established after the emancipation of the slaves in the aftermath of the Civil War. It

⁹⁸ “The Forms of Justice”, *supra*, note 93 at 9.

⁹⁹ *Ibid.* at 17.

¹⁰⁰ O. Fiss, “Two Models of Adjudication”, in R. Goldwin & W. Schambra, eds., *How Does the Constitution Secure Rights?* (Washington: American Enterprise Institute, 1985) at 47.

¹⁰¹ “The Forms of Justice”, *supra*, note 93 at 30.

¹⁰² “Eden”, *supra*, note 87 at 1673.

¹⁰³ Silbey & Sarat, *supra*, note 25 at 438.

¹⁰⁴ M. Galanter, B. Garth, D. Hensler, and F. K. Zemans, “How to improve civil justice policy: systematic collection of data on the civil justice system is needed for reasoned and effective policy making” (1994) 77 *Judicature* 185.

was the courts, initially the U.S. Supreme Court and then the federal court system at large, that took the controversial step of rejecting “separate but equal”, a judge made doctrine, by proclaiming the constitutional requirement of racial equality.¹⁰⁵ The controversy generated by the *Brown v. Board of Education*¹⁰⁶ decision embraced many of the most basic elements of the legal system: interpretation of an old, generally worded constitutional text, the legitimacy of judicial review and the role of the federal courts as against state governments. But it also engaged the question of legislative failure, first in dismantling racial segregation as a constitutional imperative and later in failing to follow the directives of the court as to the application of that imperative in particular cases of rights infringement.

The Warren Court’s decision in *Brown* and its progeny marked a time of activist judicial recognition of constitutional norms and acceptance of the court system as their champion. Through this line of cases, the U.S. Supreme Court began the task of bringing the legal system into the family of post-war rights-protecting regimes by realizing equality values in respect to race as constitutional imperatives, including the extension to administrative tribunals of court-like procedural protections where rights were engaged. This approach has since been undermined by disenchantment with liberal values and by doubts about the efficacy and legitimacy of their realization by federal courts. In the demise of this approach, one sees the demise of faith in the normative force of law and courts more generally. Thus it is not surprising that Fiss, the American academic who stresses the unique role of courts to promote public values as against the alternative dispute resolution movement, and the role of the courts in imposing those values by way of structural injunctions, does so in large part in the name of the Warren Court’s vision of constitutional interpretation, constitutional rights and constitutional remedies.

And while Fuller would likely not have joined Fiss in relegating private law disputes between parties solely to private arbitration, he would likely have considered constitutional rights cases as entailing the reasoned proffering of proofs and arguments necessary to the adversary system.¹⁰⁷ While the dismantling of racial segregation at large might be considered a polycentric problem appropriate to resolution by legislatures, consideration of the specific reasoned claims by a particular group of Black children to entitlement to equal protection in the form of an adequate public education within a particular school district would properly fall to a public juridical officer—both to resolve the particular dispute as well as to set the rules for further judicial, executive and legislative action.

The adoption of the *Charter* in 1982, which marked Canada’s constitutional commitment to the post-war rights-protecting world, involves a very different story about rights and courts. Canada took this step by formal constitutional amendment, as the culmination of decades of debate and drafting amid strong popular support, not by judicial fiat. It is important to note that Canada did so in full awareness of the rise and incipient fall of the parallel phenomenon within the U.S. legal system. Indeed, in formulating its substantive and procedural content, those who contributed to the development of the text of Canada’s *Charter* deliberately took rights-protection further than the contemporary U.S. positions.

¹⁰⁵ The U.S. Supreme Court’s affirmation of the constitutional permissibility of the “separate but equal” state policies dates from *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁰⁶ 347 U.S. 483 (1954), 349 U.S. 294 (1955).

¹⁰⁷ See Fuller’s account of federalism disputes as appropriate for judicial determination, *supra*, text at note 57.

For Canada, this step, although effected by constitutional amendment, did not mark as strong a break with the past as *Brown* has come to be understood as representing in the U.S. In Canada, the normative commitments and institutional roles embodied in the *Charter* build upon values and roles more or less accepted within the Canadian legal system. For example, while overruling the U.S. Supreme Court's longstanding separate-but-equal rule was controversial,¹⁰⁸ the cases that the *Charter* text was formulated to overturn were left behind without generating any discernible element of public, academic or professional dissatisfaction.¹⁰⁹ The U.S. was pinned down by the challenge of reading twentieth century ideas of equality from an old text, composed of a series of amendments, initially crystallized to legitimize a new, revolutionary state in the eighteenth century world, and later revised to accord with the racial settlement after the Civil War. Canada, in contrast, started afresh with a clear twentieth century, codified statement signalling a new beginning. Similarly, Canada's unitary court system had engaged in judicial review since Confederation in 1867 with far less controversy than had the U.S. federal courts, which imposed central authority and individual equality on recalcitrant, primarily southern state governments. Moreover, Canada's commitment to the international regimes of rights protection as well as the family of national rights-protecting systems that arose in the post-war period was much stronger.

Accordingly, the argument for the primacy of courts and of law, as adumbrated by Fiss and Fuller, occupies more solid ground in Canada. Their work is nevertheless of great conceptual value in clarifying the space for law, and thus the space for courts, in our legal culture. The discussion now turns to the Canadian constitutional framework that informs the question of access to civil justice to see how well these ideas travel.

2. CONSTITUTIONAL REQUIREMENTS THAT CIVIL DISPUTES *MUST* BE IN THE COURT SYSTEM

The *Canadian Charter of Rights and Freedoms*, 1982 makes express the supreme legal status of constitutional norms and the authorization of judicial review to protect those norms from legislative or executive encroachment.¹¹⁰ This statement of the supremacy of the constitution as law reaffirms longstanding operative values within the Canadian legal order.¹¹¹

¹⁰⁸ *Plessis v. Ferguson*, *supra*, note 105.

¹⁰⁹ See, for example, *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711 and *Lavell v. A.G. Canada*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481.

¹¹⁰ *Constitution Act*, 1982, ss. 52, 24 and the preamble make reference to the "rule of law". The *Charter of Rights and Freedoms*, 1982 protects these norms through the guarantee of stated rights and freedoms against all but justified limitations in a free and democratic society. A temporary, express legislative override is available for some rights but is rarely used (See sections 1 and 33).

¹¹¹ For example, there has been little controversy over the courts' role in policing Canadian federalism, including the power to strike down laws of the legislatures and of Parliament. Canada has no requirement similar to the "case or controversy" stipulation of the U.S. Constitution and Canadian cabinets at the federal and provincial level are empowered to send requests for advisory opinions to the courts—the federal Cabinet to the Supreme Court of Canada and the provincial cabinets to the provincial courts of appeal. Many of Canada's most important constitutional cases have been reference cases of this sort and one of the most important of these, the *Patriation Reference*, included unprecedented judicial discussion of constitutional convention — both in terms of its existence and compliance: *Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. Remedial authority has also been extensive. In addition to striking down laws, the Supreme Court of Canada has ordered the Manitoba legislature to

The commitment to a legal order safeguarded by courts of law has, in particular, informed interpretation of s. 96 of the *Constitution Act, 1867*, as amended, which operates to protect court jurisdiction over legal questions, as well as other determinations relating to access to the superior courts. Constitutional interpretation has worked to forward the rule of law, judicial independence and a unitary court system.

Other features of the constitutional order impinge more directly on the powers of the courts, for example, the constitutional strictures that derive from s. 96 of the *Constitution Act, 1867*, and the judicially developed standards for access to judicial review of administrative action, as well as the new possibilities under the *Charter*. Each of these areas merits detailed discussion.

(a) SECTION 96 OF THE *CONSTITUTION ACT, 1867* AS AMENDED

Section 96 of the *Constitution Act, 1867* simply vests the power to appoint superior court judges in the Governor General:

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

The basic idea informing the interpretation of s. 96 is that the superior court judges of the province, as the successors of the royal courts of inherent jurisdiction in the United Kingdom, are the only fully independent judges in our legal system. Their independence derives from the judicature provisions of the *Constitution Act, 1867*, ss. 96-100, which provide federal appointment, security of tenure and guaranteed salaries. This status is understood to shield the judges from allegiance or obligation to their appointing government at the federal level and from any political pressures or perceived need to please the government of the day, either federal or provincial. As a result, the adjudicative function has legal analysis as its exclusive focus. From the point of view of the citizen who brings cases to courts of law for resolution, s. 96 preserves access to fully independent decision-makers, learned in the law and impartial as between citizens and as between government and citizens.

This normative content has not been controversial. In effect, however, court rulings in this area have systematically incapacitated provincial governments from vesting authority to resolve disputes in their own appointees, either officials or deliberative administrative bodies.¹¹² S. 96 thus impedes the mandatory diversion of legal disputes from courts of law.

In operation, s. 96 works to preserve certain types of legal issues as the exclusive preserve of the superior courts. This exclusive jurisdiction is comprised of what were, in the nineteenth century, the basic civil rights enjoyed by individuals, i.e., civil rights pertaining to contract, property and tort. The basic rule is that the legislative arm of the provincial government cannot transfer judicial authority in respect to such matters to its own appointees, because they do not enjoy the protections afforded by the judicature provisions of the Constitution. The presuppositions of this rule are precisely those rejected by the movement for access to civil justice: the distinction between law and politics, the neutrality of law, the resolution of disputes

translate laws into French to comply with constitutional requirements and, pending compliance, ordered the continued validity of unilingual laws in order to preserve the rule of law. These features suggest that the role of the courts is considered complementary to, not inconsistent with, Canadian parliamentary democracy.

¹¹² The discussion is restricted to the strictures imposed on provincial governments in their choice of institutional arrangements for the resolution of disputes.

through the application of intelligible legal concepts and the juridical equality of the parties however different their social, political and economic status.

Section 96 systematically restricts the options available to the province in allocating dispute resolution functions to its own appointees. While its restrictive force has come to form a pattern, individual decisions have, nevertheless, surprised those who develop provincial policy as well as those who favour less formal, less time-consuming, and less expensive dispute resolution generally or in particular subject matter areas. Critics would observe that the doctrine has steadily moved to enlarge the exclusive preserve of judicial authority, even in situations where the provincial government in question has directed attention to the precise statements of doctrine in formulating its policy, legislation and institutional arrangements. A more measured view perhaps is that the courts have curbed the tendency of legislatures to whittle away at superior court jurisdiction by superficially transforming "old rights", traditionally adjudicated in the courts of law, into "new entitlements" subject to the deliberations of lower courts, officials or administrative tribunals.

Basic to s. 96 is the prohibition against vesting "superior court functions" in bodies other than superior courts. This rule serves a number of ends. At a minimum it ensures the actual appointment of superior court judges by the Governor General. It also sustains the traditional base of superior courts' jurisdiction for those appointees as against the provincial government of the day. It goes further, to safeguard the rights of the citizen by ensuring that certain kinds of legal claims as between disputing claimants continue to be subject to adjudication by independent judges, applying pre-existing legal rules formulated by elected and responsible legislatures or independent judges adumbrating the common law. It protects the Confederation bargain embodied in our federally appointed unitary court system—as against provincial erosion of its jurisdiction in favour of provincial appointees.

The section has been actively litigated in recent years. Powers struck down include authority vested in provincially appointed officials to make rulings in regard to property (e.g., matrimonial home,¹¹³ landlord-tenant disputes¹¹⁴) and the exercise of powers characteristic of superior courts (e.g., injunctive relief, supervisory jurisdiction over inferior tribunals,¹¹⁵ appellate review of legal questions initially decided by provincial appointees.¹¹⁶) Powers held to be properly exercised by provincial appointees include rulings over matters identified as not analogous to those within superior court jurisdiction either because the interests are novel for courts of law (e.g., rent review,¹¹⁷ farm equipment debt¹¹⁸) or the judicial function is not

¹¹³ *B.C. Family Relations Act*, [1982] 1 S.C.R. 62.

¹¹⁴ *Ref. re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3rd) 554.

¹¹⁵ *Crevier v. A.G. Quebec*, [1981] 2 S.C.R. 220.

¹¹⁶ *A.G. Quebec v. Farrah*, [1978] 2 S.C.R. 638.

¹¹⁷ *A.G. Quebec v. Grondin*, [1983] 2 S.C.R. 364.

¹¹⁸ *Massey-Ferguson Industries v. Saskatchewan*, [1981] 2 S.C.R. 413.

central (e.g., cease and desist orders within labour relations regulation¹¹⁹) or as an acceptable enlargement of the monetary levels within inferior court jurisdiction.¹²⁰

There are two lines of cases under s. 96. The first involves jurisdiction vested in inferior courts, which are adjudicative bodies dealing with cases that involve relatively low monetary amounts. The concern in these cases is to assure that expansion of the jurisdiction of inferior courts such as small claims courts, which is permissible, does not “undermine the independence of the judiciary which s. 96 protects”.¹²¹ The second and more problematic line of cases addresses the allocation of decision-making powers to administrative tribunals. These tribunals are permitted to exercise traditional judicial powers within an innovative framework for treating the problems assigned to them. “Bald grants of superior court jurisdiction”, however, are not permissible.¹²²

The leading case on the application of s. 96 to administrative tribunals is the 1981 *Reference re Residential Tenancies Act*.¹²³ In a unanimous judgment, the Supreme Court of Canada struck down the powers of the Ontario Residential Tenancies Commission to resolve disputes between landlords and tenants by making orders of eviction and compliance. The invalidated legislation attempted to provide precisely what the access-to-law movement promotes: a more efficient, more responsive, less formal process for the resolution of residential tenancy disputes involving modest monetary claims and subject to established rules.

The *Residential Tenancies* case sets out a three-part s. 96 test: historical jurisdiction, judicial function, and institutional setting. Any power that fails all three tests is inconsistent with s. 96 and therefore falls exclusively to the superior courts. The test thus marks the limits within which proposals to displace the courts must operate.

The first part of the test is an inquiry into the legal history of superior court jurisdiction: does the impugned jurisdiction broadly conform to jurisdiction exercised exclusively by superior court justices at Confederation?¹²⁴ The *Residential Tenancies* judgment drew attention to the fact that “[t]he resolution of disputes between landlords and tenants has long been a central preoccupation of the common law Courts,” noting that “[a]s early as 1587, Lord Coke observed that the law of landlord and tenant was vital since, ‘for the most part, every man is a lessor or a lessee...’”¹²⁵ Accordingly, the Court concluded that despite making significant legislative changes to substantive landlord-tenant law¹²⁶, the Ontario legislature had in effect

¹¹⁹ *Tomko v. Labour Relations Board of Nova Scotia*, [1977] 1 S.C.R. 112.

¹²⁰ *Re Quebec Magistrate's Court*, [1965] S.C.R. 772.

¹²¹ *Yeomans v. Sobeys Stores Ltd.*, (1989) 57 D.L.R. 4th 1 (S.C.C.) at 11 *per* Wilson J., Dickson C.J.C., McIntyre and Lamer JJ., concurring.

¹²² *Ibid.* at 11. Wilson J.'s comment is stated to apply to powers exercised by inferior tribunals but the content and the organization of the paragraph should be read as a reference to administrative tribunal functions as well.

¹²³ (1981), 123 D.L.R. (3rd) 554.

¹²⁴ *Ibid.* at 555 and 571.

¹²⁵ *Ibid.* at 558.

¹²⁶ By stages over two decades, the Ontario legislature transformed the law of landlord and tenant. It had abolished the ability of the landlord to take repossession of residential premises by requiring a writ of possession and provided a tenant advisory bureau for mediation; added rent control and security of tenure; created a Commission

transferred traditional superior court power to order eviction and compliance to the newly constituted Commission and by so doing breached s. 96.

Within a decade, in *Sobeys Stores Ltd. v. Yeomans*, the Supreme Court introduced two important refinements to the historical inquiry, both of which made the displacement of courts more difficult. The first clarified the historical benchmark. The arrangements in the four original provinces at Confederation in 1867 were to be determinative for all ten provinces, and in the case of a tie, the courts were to look to the allocation of the jurisdiction in 1867 in the United Kingdom.¹²⁷ The court thereby signalled its intention to avoid its earlier determination that, because of different local histories, provincial appointees in Quebec could adjudicate the kind of residential tenancy disputes that it had confined to superior courts in Ontario.¹²⁸ The need to maintain a guaranteed core of superior court jurisdiction in order to provide a constitutional basis for national unity through a unitary judicial system meant that, in principle, s. 96 should apply uniformly across the country.¹²⁹

The other refinement dealt with the mode of characterization of the dispute-resolving power in question. The Court pointed out that, in most cases, a more expansive characterization of the power would likely lead to the determination that at least some had fallen within the purview of the inferior courts at Confederation, and thus validation of the power on the historical test.¹³⁰ Narrower characterizations, in contrast, were more likely to lead to the opposite finding and therefore to the invalidation of the legislation. The Court held that, since the purpose of the historical inquiry was to provide a threshold test for violations of s. 96, the jurisdiction of the pre-Confederation inferior courts should not be retrospectively expanded. Therefore, the Court would favour narrow characterizations.¹³¹ Moreover, the characterization was to refer to the type of dispute, not to the particular (and possibly innovative) remedy; otherwise superior court jurisdiction would be frozen to its pre-Confederation remedial scope. Similarly, it was sufficient for the challenger to establish "broad conformity" with the powers of the pre-Confederation superior courts; "analogous" rather than identical jurisdiction was all that was necessary to find the power within superior court jurisdiction.

These refinements on the *Residential Tenancies* historical test bolster the restrictive operation of s. 96. The values explicitly informing the Court's restrictive interpretation of s. 96 are significant: the independence of the judiciary¹³², the integrity of the division of powers, the

to deal with the large number of applications for eviction orders in a prompt, efficient and informal summary way; provided advice and mediation. The province of Ontario argued unsuccessfully, in support of the legislation, that the modern world of high-rise, high density residential tenancies coupled with the policy of supporting tenancies through security of tenure and rent control had transformed the nature of the relationship between the landlord and tenant and therefore transformed the oversight of their relationship as well. (The author of this paper was of counsel for A.G. Ontario in this case.)

¹²⁷ *Sobeys, supra*, note 121 at 17ff.

¹²⁸ Reference re *Residential Tenancies, supra*, note 123 and *Re A.G. Quebec and Grodin*; (1983), 40 D.L.R. (4th) 605.

¹²⁹ *Sobeys, supra*, note 121 at 19-21.

¹³⁰ *Ibid.* at 11.

¹³¹ The Court also indicated that the characterization relevant to the historical inquiry should not be broadened in the subsequent two parts of the test. *Ibid.* at 13.

¹³² *Ibid.* at 11.

maintenance of “a guaranteed core of superior court jurisdiction,”¹³³ and the forwarding of national unity through a unitary judicial system.¹³⁴ The Court’s precision in fine-tuning the historical enquiry when combined with the high purposes it ascribes to s. 96 indicate that, despite widespread criticism, the Supreme Court is not inclined to relax the s. 96 strictures and is unlikely to read the section narrowly in order to accommodate more flexibility within the provincial justice system.

If the historical inquiry shows that exercise of the impugned power is analogous to the pre-Confederation jurisdiction of the superior courts, one then moves to the second and third parts of the test to see if the power can nonetheless survive review. These further criteria allow for some flexibility in the exercise of legal powers by provincial appointees, but only if the powers differ significantly from the those that are the preserve of the federally appointed judiciary.

The second part of the test focuses on whether the tribunal is exercising a judicial function and is therefore performing the activity characteristic of federally appointed judges. The Court has formulated the judicial function as follows:

[T]he hallmark of a judicial power is a *lis* between the parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.¹³⁵

Thus, the *indicia* of the judicial function are: parties who initiate and control the determination of the dispute, the application of recognized rules, the centrality of the parties’ rights, and fair and impartial procedures. On the other hand, the following features (all of which loom large in the access to justice literature) do *not* detract from the judicial nature of the function:

- the absence of “significant jurisprudential questions”;
- the admixture of non-judicial functions, such as inquisitorial or mediation functions;¹³⁶
- statutory codification of the rules or principles that provide the basis for decision-making;
- the simplification of procedures.

In the s. 96 jurisprudence, the judicial function is distinguished from the administrative function. The administrative function features: a discretionary decision forwarding the broad social policy of the legislative scheme for the collective good of the community rather than the rights of individuals who come before the decision-maker; an “untrammelled discretion to get

¹³³ *Ibid.* at 19.

¹³⁴ *Ibid.* at 20, quoting Dickson J., as he then was, in *Residential Tenancies*, *supra*, note 123 at D.L.R. 566-7.

¹³⁵ *Ibid.* at 588.

¹³⁶ Mediation may be imposed but not on a compulsory basis. *Ibid.* at 577-8 and 581. See also *Canmax Properties Corp. v. Vancity Enterprises* (1991) B.C.J. No. 3033 (B.C.S.Ct): a provincial legislature may impose an alternate tribunal to the courts in legislation, provided it permits the parties to contract out of that alternate method of resolution. *Quinette Coal Ltd. v. Nippon Steel Corp. et al.*, 29 B.C.L.R. (2d) 233, 1 W.W.R. 120, (B.C. S. Ct): s. 96 does not preclude agreement to appoint a “private judge” to resolve a dispute even if such a “judge” would exercise powers restricted to s. 96 judges.

things right”;¹³⁷ the application of specialized expertise to the problem, including weighing interests and assessing implications according to policy directives or in the development of policy.¹³⁸ A prime example is decision-making by representatives of interested groups on a tripartite panel relying on experience and expertise.¹³⁹

The third part of the test deals with the institutional setting of the impugned power. The task under this part of the test is to examine powers, already labelled as historically and functionally those of superior courts, in order to ascertain whether, in context, such powers are permissible to provincial appointees because they are ancillary to primary, non-judicial functions. The *Residential Tenancies Reference* judgment provides a wide array of formulations, both positive and negative, to convey this idea of ancillarity: the powers must be adjunct, subsidiary, incidental, subsumed; the powers must not be sole or central, dominant in aspect, primary, the nuclear core.¹⁴⁰

The *Residential Tenancies* tripart test establishes this rule: the legislature may take disputed matters that are historically the fare of superior court adjudication out of the superior courts if it offers oversight that is close to that provided by an administrative tribunal, i.e., a policy laden decision on the occasion of dispute resolution. It is necessary to remove the primacy of the original bipolar claims to a rule-based, rights vindication—a transformation from the judicial *lis* that some alternative dispute resolution processes, such as arbitration and mediation, do not reach.¹⁴¹

Section 96 restricts the provincial legislatures from moving basically adversarial rights-based disputes out of the courts of law on a mandatory, final basis. It does not, however, preclude private arrangements that bind the parties to resort to private dispute resolution.¹⁴² *Sobeys* deals with statutory, rather than contractual, terms. Accordingly, the third part of the test allows the provinces to use specialized bodies to enforce statutory standards by mechanisms that are quick, effective, and less expensive than courts. Further, s. 96 does not preclude adding features of alternative dispute resolution to the mix of procedures available in the pre-trial period, either to induce settlement or to focus and narrow the factual and legal

¹³⁷ *Residential Tenancies*, *supra*, note 123 at 578.

¹³⁸ *Ibid.* at 581.

¹³⁹ *Ibid.* at 582.

¹⁴⁰ See, for example, *Levey v. Friedmann* (1985), 63 B.C.L.R. 229 (S.C.): Boards of review under workers' compensation legislation, established by Ombudsmen, are not "courts" under s. 96. They do not make decisions based on pre-existing law but deliberate on policy and expediency, engage in inquisitorial functions and lack the impartiality of superior courts. *Mehta v. MacKinnon* (1985) 67 N.S.R. (2d) 112 (S.Ct.): Boards of Enquiry under a *Human Rights Act* are consistent with s. 96 because judicial function was mixed with consideration of public good.

¹⁴¹ This formula does not present a desirable goal in terms of dispute resolution design. To move contested issues such as landlord-tenant, consumer complaints, debt collection, or even custody decisions so far into a policy process, and thus so far away from the bipolar dispute, seems to go far beyond an agenda that seeks faster, cheaper and less formal access to dispute resolution.

¹⁴² *Weber v. Ontario Hydro* (1995), 125 D.L.R. 4th 583. (S.C.C.) Here the tort and *Charter* claims of a unionized employee, who brought suit against his employer, were struck out as falling within the collective agreement and thus within the arbitration procedure set down by the *Ontario Labour Relations Act*.

issues in contention. Finally, for matters of a sufficiently small monetary amount, judicial functions may vest in inferior courts.¹⁴³

The Supreme Court of Canada's approach to s. 96 has attracted considerable criticism and prompted serious efforts at constitutional amendment. Because these rulings have restricted legal transformations that extend the welfare state, some charge the judges with hostility to wealth redistribution and protection of the poor and weak. Others view the judges as hostile to the use of administrative procedures to resolve disputes as part of a larger policy mandate. There has even been speculation that the judges are protecting their own turf, not on jurisprudential or ideological grounds, but simply to safeguard their own status and stature.

These criticisms indicate a widespread rejection of the courts' interpretation of s. 96. One might accordingly consider the advent of the *Charter* a propitious occasion for rethinking the fit between s. 96 doctrine and other constitutional values. Or one might seek to evaluate the costs of the restrictive rulings to the orderly development of legal principles, by examining the firm lines of judicial authority that the *Charter* has drawn explicitly, rather than against the doctrinal lines the judges have developed, on a case by case basis, to protect concededly important values.

Given current doctrine, however, it would not be advisable to reform the court system without careful thought to s.96. The fate of the *Residential Tenancies Act* offers a salutary example. The Ontario government expended considerable effort to develop its landlord-tenant dispute resolution innovations to comply with s. 96. While the reasons for judgment make clear that more extensive use of inferior courts, with attention to monetary limits, would fall within the Supreme Court's current s. 96 tests, one could have no confidence in suggesting any major modification in the handling of tenancy disputes that would suffice to resist a s. 96 challenge.

(b) PRIVATIVE CLAUSES CANNOT OUST REVIEW ON JURISDICTIONAL GROUNDS

Aside from the interpretive implications of s. 96, other constitutional doctrines also protect the exclusivity court jurisdiction. Privative clauses have been held ineffective, for example, to oust judicial review of administrative action for jurisdictional error.¹⁴⁴ This conclusion is based on general principles of the rule of law and the separation of powers. Provincial appointees may exercise only the power granted by the legislature, and determining what is granted is the exclusive preserve of the superior courts. If this were not the case, the appointees would be able to define the limits of their own power.

(c) PRIVATIVE CLAUSES CANNOT OUST REVIEW ON CONSTITUTIONAL GROUNDS

One final consideration restricting the type of jurisdiction that can be vested in provincial appointees is the rule that constitutional issues cannot be definitively determined without recourse by the parties to the superior courts, either by way of appeal or judicial review. The

¹⁴³ In this vein, it is interesting to note that, in *Residential Tenancies*, *supra*, note 123 at 565 and 566, Dickson J. notes at a number of points that the jurisdiction vested in the Residential Tenancies Commission involved a large body of important law, covering over one million rental units, with no limit on the monetary value of the orders rendered.

¹⁴⁴ *Crevier*, *supra*, note 115. See also *Jacmain v. A.G. Canada*, [1978] 2 S.C.R. 15.

Supreme Court of Canada now seems to consider the expertise of the tribunal, rather than the legislature's stipulation of appeal or judicial review powers, as the factor that determines the mode of review.¹⁴⁵ Thus, for example, even on judicial review, judges will exercise an appellate function where they determine that the tribunal or decision-maker has no greater expertise on the question than would judges.¹⁴⁶

(d) *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, 1982*

The adoption of the *Charter*, as noted earlier, signals a re-commitment to law as embodying the state's fundamental values and courts as the institution that voices those values. The preamble, for example, states that Canada "is founded upon principles that recognize ... the rule of law" and s. 52 states that any law inconsistent with the Constitution of Canada is, "to the extent of the inconsistency, of no force or effect". Under s. 24, the enforcement section, *Charter* claims may be brought for infringements or denials of *Charter* guarantees to a court of competent jurisdiction, i.e., a court having jurisdiction over the parties and the subject matter. Such a court need not be a superior court. An administrative tribunal may determine the constitutionality of a provision relevant to its deliberations as long as it possesses authority to decide an issue of law.¹⁴⁷ Judicial review must be available, and there will be no deference to the decision on the constitutional question.¹⁴⁸

The *Charter* affects the question of access to civil justice in two ways, other than in the processing of *Charter* claims *per se*. Both arise under s. 7, which guarantees that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first is judicial oversight of the procedural proprieties observed within the administrative process. The *Charter*'s s. 7 has given the reviewing courts a constitutional mandate to impose procedural safeguards where life, liberty and security of the person are engaged.¹⁴⁹ This function may be understood as the constitutionalization of the common law content of natural justice. There is substantial case law in this area to date although it is apparent that it will take more time for the Supreme Court of Canada to delineate the full contours of procedural fundamental justice under s. 7. The pattern of decisions builds upon the common law protections under the rubric of natural justice, which are subject to statute. Process guarantees

¹⁴⁵ *Bell Canada v. Canada* (C.R.T.C.), [1989] 1 S.C.R., *Pezim v. British Columbia*, [1994] 2 S.C.R. 557, A.G. *Canada v. Mossop*, [1993] 1 S.C.R. 554.

¹⁴⁶ *Mossop*, *supra*, note 145.

¹⁴⁷ *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 (an arbitrator under a collective agreement with statutory power to decide a question of law) and *Cuddy Chicks v. Ontario*, [1991] 2 S.C.R. 5 (labour relations board with statutory power to decide a question of law). In *Tetreault-Gadoury v. Canada*, [1991] 2 S.C.R. 22, the Board of Referees under the *Unemployment Insurance Act* was held not to have power to decide questions of law. For criticism of this result, on the basis that statutory tribunals enjoy a *de facto* authority to decide all issues of fact or of law that arise in a matter properly put before them, see P. Hogg, *Constitutional Law of Canada*, 3 ed. (Toronto: Carswell, 1992).

¹⁴⁸ *Cuddy Chicks v. Ontario*, *supra*, note 147.

¹⁴⁹ See R. Macdonald, "A Theory of Procedural Fairness", (1981) 1 Windsor Y.B. Access Just 3.

derived from the *Charter*, in contrast, are superior to statute. It is possible that the procedural protections derived from s. 7 would restrict the possibilities for altering procedure for dispute resolution. For example, pre-conditions imposed as preliminaries to adjudication might raise claims to impairment of a party's chances to win in the ultimate adjudication, or mediation might create a context where an unrepresented party was compelled to divulge information prejudicial to her position in the later adjudication.

The second effect is to question whether the *Charter* gives an absolute right to go to court. Proposed legislation taking away the right to sue for damages for cancellation of the Pearson Airport contract aroused controversy on this score. It is unlikely that such legislation could be successfully challenged under the *Charter*, because s. 7. does not expressly protect rights to property and the courts have taken the absence of such a guarantee as a signal not to interpret other elements of s. 7 as protecting property interests. The express entitlement to security of the person would provide a more plausible basis for future litigation, however. For example, if the legislature were to remove rights to sue for compensation for bodily injury, without providing an alternative compensation scheme, one might argue that one's right to security of the person had been removed contrary to the principles of fundamental justice.

3. CASE STUDIES IN THE MERITS OF ADJUDICATION: WORKERS' COMPENSATION AND HUMAN RIGHTS

This discussion of the access to justice movement and the constitutional framework makes clear that there are no easy answers in the search for dispute resolution that is just and at the same time prompt, inexpensive, and easily accessed. The largely U.S. literature on dispute resolution yields no reliable guidance as to the optimal alignment of subject matter and process and offers a disquieting picture of alternatives that seem, upon examination, to compromise the just resolution of claims without reliably offering quantifiable advantages. The Canadian constitutional framework gives more priority to courts for the adjudication of rights and therefore offers even less room for innovation. With so little guidance to reach the goals of the access to justice movement and strong constitutional impediments to wide-ranging change, one is left to consider how to improve the multi-faceted existing offerings for dispute resolution. The most promising approach may be to work through the implications of these findings by (1) examining specific areas of concern according to the distinctive claims of right that arise and, then, (2) looking for ways to affirm the just merits of claims with an eye to the most expeditious and effective institutional design.

This approach gives some insight into the question whether two established dispute resolution regimes in Ontario, both of which exclude court adjudication, are optimally designed. The workers' compensation scheme and human rights code are statutory systems that include administrative arrangements that process large numbers of individual cases. The workers' compensation system dates from early in this century, a response to changes in the workplace effected by the industrial revolution, and stands as an early response to perceived inadequacies of the common law. Human rights claims, in contrast, are a phenomenon of the post Second World War commitment in western democracies to equality, in particular racial equality. The Ontario Legislature created the Ontario Human Rights Commission, with its administrative and adjudicative arms, to fill a vacuum that the courts had refused to fill.

(a) WORKERS' COMPENSATION

Ontario developed its workers' compensation system as a progressive, pervasive way of dealing with workplace accidents outside the tort system. After a major study canvassed the legal issues both historically and in a number of countries early in this century, it concluded that the tort system's fault basis was unsatisfactory for workplace injuries¹⁵⁰: that civil process was too costly and too slow; it provided relief, if at all, only at the end of protracted proceedings; the process of fact-finding was too costly and not fully reliable; the requirement of fault often proved too difficult to establish; a finding of fault often resulted in no remedy for the injured worker, e.g., because of the negligence of a fellow worker or of the injured party, or mixed findings of fault; successful negligence actions might not lead to recovery if the defendant was impecunious or devious. Examination of successful cases suggested over-compensation for minor injuries and inadequate compensation for serious ones. The combined effect of lost wages and the expense of medical care often left injured workers without urgently needed medical care and their families destitute pending the slow workings of the courts. The tort system was not effective in imposing responsibility on employers to insure adequately, especially for activities that were inherently dangerous, or in providing adequate incentives for employers to provide a safer workplace or adequate employee training for safety.

The no fault system now in place was designed to respond to these failings by providing a fund, made up of employer and employee contributions, dispensed to all workers injured in the workplace. The historic trade-off that formed the basis for the new scheme offered benefits to both employers and employees. Employers acquired the advantages of a known, limited levy for the compensation of workplace injury, however caused. Employees gained the assurance of payments for injuries without proof of fault, at a level lower than a successful court case would yield but available immediately without the cost, delay and uncertainty of court proceedings. Later modifications of the scheme added an administration committed to workplace safety, rehabilitation and retraining.

This is an intricate, broad-based, and highly integrated scheme. Major changes to its basic features, particularly changes that would undermine the historic trade-off, should respond to failings in design rather than to inefficiencies or ineptitude in operation or inadequate funding.

Current dissatisfaction with the workers' compensation system in Ontario is related to operation and scope, not the design of case management. The most wide-ranging criticism is that the system has become an overly expensive social welfare scheme that compensates for injury without adequate attention to workplace causation.¹⁵¹ On this basis, employers call for a return to the original footings of the system, not a return to tort. Others raise the question whether the system admits claims that, upon closer initial scrutiny or later examination, would prove unfounded or even fraudulent. Here the call would be for reform of the intake system, reduction in the benefits afforded (to make them less attractive when compared to wages), as well as increased sanctions against those who abuse their claims to entitlement. Again, it would not seem that the availability of tort claims would alleviate this problem. Indeed,

¹⁵⁰ Ontario, *Final Report on Laws Relating to the Liability of Employers*, The Honourable Sir William Ralph Meredith, (Toronto: 1913).

¹⁵¹ The complaint is that many of the problems that manifest in the workplace, e.g., back pain, heart attack or stress related symptoms, are not workplace injuries but the result of other causes, such as aging, or non-work activities.

employers complain of the high cost of resisting fraudulent new claims or uncovering fraud on the part of workers receiving long term benefit payments. Resisting tort claims would be far costlier. Dissatisfaction with the Ontario Workers' Compensation Board administration also suggests inadequacies in general operation: waste, disorganization, poor management, lack of training and skills in bureaucratic as well as professional staff. These criticisms call for restructuring the administration. Other provincial systems, which seem to function more efficiently as well as more economically, offer models for improvement.

Employers complain of the high, and ever increasing, cost of workers' compensation levies and the resultant drain on their competitive position. They make the point that global competition requires competition with undertakings that operate in jurisdictions where workers' compensation payments are lower or where there is no public system at all. These complaints may be well founded: there are indications that Ontario employers make decisions that inhibit creation of new jobs in order to avoid higher per-worker levies, e.g., impose overtime work on current employees rather than hire new workers, and invest in expensive machinery that reduces the size of the workforce. These considerations, like the others cited, do not seem to undermine the historic trade-off underlying workers' compensation. There is no indication that re-introducing tort would lower expenditures. In jurisdictions where there is no state workers' compensation program, the costs of private insurance and tort litigation do not seem to be lower than the cost of workers' compensation programs.

Workers' compensation systems also offer advantages in a rapidly changing world. The problems with which these systems now grapple are best dealt with as a matter of social policy on a large scale, rather than by the case-by-case modality of tort litigation. The emerging problems in the modern workplace raise difficult questions of scientific knowledge, causation and responsibility, e.g., stress, repetitive strain injuries, environmental illness. These problems need extensive medical and industrial expertise for identification and amelioration as well as an environment of openness and co-operation to deal with large-scale implications for industrial health and safety. Oversight of workplace safety requires data collection and comparative analysis, as between similar and dissimilar undertakings, that is an integral part of a well-run workers' compensation system. Improving levels of safety involves a commitment to safe equipment, work process and training. The tort system cannot oversee workplace safely as well as a government body charged with that responsibility.

It may be suggested that litigation, perhaps only for devastating injury, would be compatible with the system and afford some few, very badly injured workers fuller recovery while at the same time increasing incentive for employers to maintain safe work environments. This mix of fault and no fault, however, would likely undermine the whole system, not merely make a minor adjustment at the edges. It is not clear that employees would benefit to the extent that pursuing a tort remedy might compromise the availability of the advantages that the administered scheme offers.¹⁵² Employers would soon come to understand that they were paying twice—for workers' compensation and for private insurance against large tort claims.

¹⁵² Because this is an insurance scheme, the vantage point for evaluation should be before the accident occurs. It is in the nature of such an arrangement that individual actors would have sought their individual advantage more directly had they known what was going to happen. It is also important to factor in a number of contingencies beyond the perfect plaintiff's case, e.g., the risk of poor legal representation and the possibility of a defendant who arranges his affairs so as to elude responsibility or evade remedial orders.

They would therefore want to direct more money to protect against tort awards and further resist support to the general fund.

The introduction of tort, even on a minimal basis, might also make it difficult to maintain health and safety standards in a systematic way. Employers would be concerned that providing information and permitting inspections might prejudice their ability to resist tort claims. It would become more difficult to impose increased assessments against employers with poor safety records to the extent that these employers would also find themselves open to tort actions outside the system.

For all these reasons it would appear that a mixed system would undermine those elements of the workers' compensation system that are inconsistent with delayed, fault-based adjudication, e.g., immediate compensation, rehabilitation and retraining, features of the system that are the most valuable to workers who have no choice but to engage in gainful employment that carries a certain level of risk. It would thus be advisable to pursue reform of the existing workers' compensation system rather than to make major changes to its foundational principles by re-introducing fault-based tort recovery.

(b) HUMAN RIGHTS CLAIMS

The administration of human rights complaints raises different considerations. There has never been a common law or statutory basis for a civil cause of action in the courts for discrimination in Ontario; the only redress is that afforded by the *Ontario Human Rights Act*. Unlike the workers' compensations system, enacted by the Ontario legislature to replace the unsatisfactory common law, the human rights system was a legislative creation in the absence of a common law or statutory civil right of action. Moreover, the courts later refused to acknowledge a common law tort of discrimination because the legislature had provided administrative redress. The first question that arises, therefore, is whether it would now be appropriate for the legislature to provide the civil cause of action that the courts refused. The second question is whether the criticism levied against the administration of human rights claims suggests that recourse to the courts, as a matter of public policy, is advisable.

In 1981, the Supreme Court of Canada decided, in *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*, that there was neither a common law nor a statute-based cause of action for discrimination in Ontario.¹⁵³ In so ruling, the Court overturned the decision of the Ontario Court of Appeal.¹⁵⁴ That court, in a judgment delivered by Wilson J.A., found that Ms. Bhadauria did have a common law cause of action against Seneca college, which had failed to grant her an interview, allegedly because of her ethnic origin, for a number of job openings for which she was qualified.

Wilson J.A., determined that the point in issue was without guiding precedent. Absent precedent, she reasoned, the courts should consider Ms. Bhadauria's claim against Seneca College in the ordinary course of developing the common law, responding to the needs of plaintiffs for legal protection against defendants' conduct on a case by case basis.¹⁵⁵ She turned

¹⁵³ (1981), 124 D.L.R. (3d) 193 (S.C.C.).

¹⁵⁴ *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology* (1979), 105 D.L.R. (3d) 707 (Ont. C.A.).

¹⁵⁵ *Ibid.* at 714-15.

to the preamble to the *Ontario Human Rights Code* for direction, in particular the words "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin". Wilson J.A. read these words as a statement of Ontario public policy supporting the legal entitlement claimed by Ms. Bhadauria.¹⁵⁶ She rejected the argument that the availability of recourse under the *Human Rights Code* evinced legislative intent to preclude a common law remedy. On the contrary, she concluded, by making access to adjudication by a board of inquiry subject to ministerial discretion, and not a claimant's entitlement by right, the legislature had evinced additional intention favourable to recognition of a civil cause of action. Wilson J.A. concluded that the common law afforded a cause of action for discrimination.¹⁵⁷

Laskin C.J.C. wrote the reasons for judgment of a unanimous panel of the Supreme Court of Canada overturning the Ontario Court of Appeal. He concluded that the *Ontario Human Rights Code* provided a comprehensive administrative and adjudicative treatment of discrimination with the effect of *foreclosing* a civil cause of action at common law based on a breach of the Code or on the public policy expressed by the Code.¹⁵⁸ The Legislature's purpose was to "encompass, under the Code alone, the enforcement of its substantive prescriptions".¹⁵⁹ Laskin C.J.C. viewed the Code as comprehensive and therefore exclusive, even though he acknowledged "the possibility of a breakdown in full enforcement" where settlement failed and the Minister refused to appoint a board of inquiry or where the Minister did not seek penalties on prosecution. Where Wilson J.A. saw the inability of the claimant to effectively seek legal redress for discrimination because others controlled access to the adjudicative process, Laskin C.J.C. saw the ministerial discretion to control the process as one element of the larger, comprehensive, exclusive, administrative scheme.¹⁶⁰

Laskin did not explore Ms. Bhadauria's claim to a legal "right" against discrimination, the growing problem of discrimination in an increasingly diverse society or the developing consensus rejecting racial discrimination in private dealings as unacceptable. Instead, he described her claim as an economic claim in the absence of a common law duty, and emphasized the lack of relationship between her and Seneca College.¹⁶¹

The Supreme Court's decision in *Bhadauria* attracted considerable criticism at the time. Ian Hunter took issue with the fact that a complainant did not retain control of the process and questioned how the Commission could reconcile its obligation to provide redress at the same time as it was constrained to settle the cases brought to it. He argued that the greater legitimacy of civil actions, in addition to the Code's process, would provide a double-check on the Commission's functioning.¹⁶² Ian McKenna criticized the judgment on similar grounds,

¹⁵⁶ *Ibid.* at 715.

¹⁵⁷ *Ibid.* at 715. Wilson J.A. concluded that it was unnecessary to determine if a cause of action also arose directly from the Code itself.

¹⁵⁸ *Bhadauria*, *supra*, note 153 at 195 and 203.

¹⁵⁹ *Ibid.* at 203.

¹⁶⁰ *Ibid.* at 198.

¹⁶¹ *Ibid.* at 199 and 201.

¹⁶² I. Hunter, "The Stillborn Tort of Discrimination" (1982) 14 *Ottawa Law Review* 219.

noting that the complainant had no right to a hearing or to appeal against a decision not to appoint a board of inquiry to adjudicate a complaint. He also noted that there was no requirement imposed on the Commission to state the basis on which it decided to proceed to an adjudicative hearing in some cases but not in others.¹⁶³ He praised the Court of Appeal judgment as one of many cases in which a common law court concluded that "greater weight must be attached to the principle of freedom from discrimination over freedom of contract."¹⁶⁴ These authors were critical of the view that the Code was comprehensive and, for that reason, forestalled the development of common law redress for discrimination.

The recent Cornish Report suggests that these criticisms of the Code regime remain as forceful as ever:

The single, strongest point made to the Task Force in the presentations it received was that claimants should have options and access to a hearing, if necessary. People criticized in no uncertain terms what they saw as the arbitrary, decision-making power of the Commission.¹⁶⁵

The Report recommends that claimants should have more authority over the processing of complaints, including access to more information at various stages of the process, better investigative support and access to discovery.¹⁶⁶ The adjudicative process, to which claimants should have a right, should be more independent from government by having permanent, expert appointees.¹⁶⁷ There should be less pressure to settle complaints, particularly the pressure exerted on a complainant to settle or find her complaint dismissed altogether.¹⁶⁸ The various roles of investigation, mediation, settlement and recommendation for adjudication should be separated and exercised with more skill and competence.¹⁶⁹

These complaints and recommendations suggest that complainants would prefer access to court action, even if only as a last resort, as a process wholly subject to their own control directed to the vindication of rightful claims. The Report, however, also makes clear its view that civil actions are not considered desirable for a number of reasons: judges lack the required expertise and knowledge, are unlikely by reason of social class to understand discrimination claims, and are likely to employ too narrow and legal an approach with emphasis on finding intent to discriminate and imposing blame; the court process is considered too expensive, too formal and too slow; the passive judge is less likely to discern the true merits of the case.¹⁷⁰

¹⁶³ I. McKenna, "A Common Law Action for Discrimination in Job Applications" (1982) 60 Cdn. Bar Rev 122 at 135.

¹⁶⁴ *Supra*, note 161 at 128.

¹⁶⁵ *Achieving Equality: A Report on Human Rights Reform* (Policy Services Branch, Ministry of Citizenship, June 1992), "the Cornish Report", at 88. The Task Force recommended that, on a finding that a claim was without merit, the Commission officials should withdraw support, but without affecting the claimant's ability to take the matter forward to adjudication.

¹⁶⁶ *Ibid.* at 3, 20.

¹⁶⁷ *Ibid.* at 36, 40, 43, 109, 112.

¹⁶⁸ *Ibid.* at 6, 20, 116.

¹⁶⁹ *Ibid.* at 116, 46.

¹⁷⁰ *Ibid.* at 88ff and 128.

These comments suggest why complainants, given a choice, might prefer to have their disputes resolved within the Code system. They do not settle the question whether the alternative of a civil cause of action might be advantageous in some cases and, perhaps, for the whole system.

Complainants who chose to take their cases to the courts would have to shoulder the burden of investigation and representation, but those with their own resources or support from public interest groups might feel that some cases were singular enough that the rights-based, corrective justice approach of the courts was desirable. And given the limitations of the statutory framework and the processing of complaints under the Code, complainants may want to take their claims of discrimination, fully under their own direction, to the institution that will provide full adjudication as between the parties, without a mandate to mediate, settle and preserve resources.

Adding the possibility of civil actions for a tort of discrimination might, as noted earlier, provide a way of overseeing the Code's administration. The critique of the courts set out is perhaps somewhat out of date, given that the Supreme Court of Canada has been much more willing to read Human Rights Codes liberally, as quasi-constitutional instruments, in the recent past.¹⁷¹ Moreover, the advent of the *Charter* demonstrates a further commitment to equality as part of the fundamental law in Canada as well as an endorsement of the courts as the appropriate institution for the final determination of *Charter*-based claims. Resort to the courts might provide, as Fuller suggested, a framework of rationality for the evolution of a case by case treatment of the cases by lower courts, in mediation and in administrative adjudication.

One might argue, however, that the Supreme Court of Canada's current approach to these issues is overly deferential to respondents and, therefore, that it makes no sense to enlarge its role. The perceived inhospitable attitude may be nothing more than that the courts have not been exposed to enough of these cases, in full adversary development, to understand their real significance to the individual and to the public values of our society. The Supreme Court's ruling in *Mossop*¹⁷², for example, seems to indicate that a majority of the Court claims that its expertise in the human rights area is equal to that of persons appointed to boards of inquiry for their expertise—and for that reason to engage in appellate type review without deference—and at the same time mistakes the type of expertise that is applicable. In characterizing the issue as one of statutory interpretation in that case, a judicial role, and then dealing with the Code's language without much sensitivity to its purpose or value structure, the Court signalled that the roles of courts and tribunals in respect to human rights adjudication requires rethinking. If, as now seems likely, the Courts are going to understand their judicial review function as an invitation to redo the analysis of Human Rights Code adjudicators without deference to their expertise in reading the Code and applying it to the case at hand, then perhaps it might be better to have, at least for some cases, full judicial adjudication in the first place. It would also seem consistent with the values of s. 96 and the *Charter* to recognize that human rights claims are as much bipolar, rights-based questions as tort, contract and property claims. Accordingly, while the introduction of rights of action in courts of law may undermine the administration of workers' compensation systems, it might work to forward the purposes of the human rights regime.

¹⁷¹ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al*, [1985] 2 S.C.R. 536, *C.N. v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114.

¹⁷² *Mossop*, *supra*, note 145.

4. CONCLUSION

The current academic literature on access to justice demonstrates that there are no easy answers to reforming the justice system. Without categories, data or values, it is difficult to understand the system we have, devise models and strategies for change, or recognize or measure improvement. The literature, however, does demonstrate that it is difficult to replace the basic notions of justice and the independent institutions that evolved to deliver justice, without having people complain about the lack of justice. This finding is not insignificant—it suggests that while we lack clear categories and sufficient data, we may have a firmer hold on the values at stake than we imagined. And if one had to choose where to begin, starting with values is probably easier than starting with categories and/or data, without values.

But what are these values? They are the values that we strive for in law and from courts: substance and process that respect the parties equally, that take their claims as presented seriously, that apply rules impartially and with independence, and that make sense of the substantive interests at stake. It is true that the judicial system does not always meet these aspirations. This failure does not, however, mean there is anything wrong with the aspirations; it may signal the need to work to narrow the gap between aspiration and delivery.

The access to justice literature suggests some reasons for this gap and possible responses. For example, it is clear that the courts have attracted additional workload in recent years without corresponding increases in resources or personnel. Wave three of the access to justice movement arose to a great extent from the failure to equip the courts adequately to shoulder the burdens of waves one and two. From this experience we can learn to consider the full impact of law reform initiatives on the courts when costing and allocating resources for substantive legal change.

The literature also indicates the value of understanding more about the cases that reach the courts. What kinds of cases? What issues? What comparative volume as between different types of subject matter? What precipitates resort to the courts: irreconcilable views of the facts? application of statutory terms to particular situations? contending interpretations of statute? divergent authority on the relevant points of law in the courts? poorly drafted documents? change of circumstances? By identifying what generates inordinate work for the courts, we would be better armed to address law reform to the goal of reducing resort to courts.

The radiating metaphor is helpful in envisaging a legal system that sustains itself with minimal adjudication. For example, clear statutory standards for procedural fairness in the administrative process would minimize recourse to judicial review applications. Administrative tribunals would attract less review by the courts if members enjoyed adequate training, support staff and resources. Such basic changes would involve considerable effort and expense but would increase the delivery of justice as well as reduce the need for courts to answer for the failings of other institutions.

To the extent possible, matters of relatively low monetary value should go to inferior courts for adjudication with the support of paralegals. This seems to be the best way of working within the strictures of s. 96 on functions that are historically superior court powers and not amenable to policy determination and at the same time giving access to justice in an informal, inexpensive context. There should be some constraint on access to these courts to ensure that they do not become debt collection agencies for businesses that externalize the risks of failed contracts or tenancies, perhaps by restricting the number of cases per business undertakings over a period of time or charging fees to recapture full costs for undertakings that produce a

lot of court cases. Computerized assistance to dispense legal information (not advice, except when to consult a lawyer), and guidance in filling out forms, e.g., divorce papers, change of name papers, landlord tenant notices, living wills, and substituted consent, would also alleviate court congestion. The government, perhaps at the municipal level, might make available a system of voluntary services for dispute resolution, perhaps as adjuncts to the inferior courts, offering low cost arbitration, mediation, conciliation, citizen dispute settlement.¹⁷³ As an adjunct, public education, including lectures and informational material, might be made available in areas of law that touch peoples' lives pervasively, e.g., consumer transactions, family law, landlord-tenant, medical care.

When it comes to processing cases once they come to the courts, the focus should be on streamlining so that as little comes to adjudication as possible. Parties should be urged to agree on the facts to the extent possible, narrow the issues, give precise articulation to what separates them. Court assistance should be provided to assist parties in settling the facts and narrowing the issues, e.g., arranging settlement conferences and negotiations for settlement. Disclosure should be strictly mandated. Lawyers might be required to provide a statement to their clients, and to a pre-trial judge, indicating the perceived chances for success and the grounds on which this view is held.¹⁷⁴ The academic literature should be combed for ideas that facilitate this kind of streamlining, especially procedures that restrict the opportunities that lawyers have to prolong and over-complicate the conduct of litigation.

Within the strictures of s. 96, as outlined in this paper, parties should be encouraged to consider taking issues out of the adjudicative stream when they come to an agreement that mediation or arbitration is appropriate. It might be appropriate to offer incentives to try these methods before resort to court, such as access to earlier court dates or pre-trial arrangements. For traditional judicial functions, however, mandatory alternative dispute processing is precluded by s. 96.

These suggestions are not offered as comprehensive. The idea is to think about strengthening and supporting the effectiveness of the legal system while minimizing its function. In trying to define the "space of law in society"¹⁷⁵, it is useful to remember Fuller's idea of rationality and his image of law as providing the rational framework for extensive interaction in society. It is also important to remember that people go to court to settle disputes as a last resort, to claim justice. By doing so, they give judges the opportunity to settle disputes

¹⁷³ S. Shetreet, "Remedies for Court Congestion and Delay: The Models and the Recent Trend" (1979) 17 U.W.O.L. Rev. 35.

¹⁷⁴ This document should be kept apart from the court record and not be available to the other party or parties. It should be available to the trial judge at the end of the hearing when deciding any issue of costs.

¹⁷⁵ Silbey & Sarat, *supra*, note 25 at 438.

while also setting a framework for the rational ordering of society, often when legislatures have failed to provide adequate guidelines or cannot yet see the way, or when constitutional values are engaged. The institutionalization of the legal system in the courts serves such an important role in society that it is important to keep it accessible and affordable and also to ensure that its efficiency, effectiveness and dispatch work to forward the values of justice.

THE REALLOCATION OF DISPUTES FROM COURTS TO ADMINISTRATIVE AGENCIES

MARTHA JACKMAN

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THE REALLOCATION OF DISPUTES FROM COURTS TO ADMINISTRATIVE AGENCIES

MARTHA JACKMAN

1. INTRODUCTION

The goal of the Ontario Civil Justice Review, as described in its terms of reference, is the achievement of a "more efficient, less costly, speedier and more accessible" civil justice system for Ontario.¹ Within this overall objective, the following research paper was commissioned to examine whether there are specific types of disputes within the jurisdiction of the civil courts which could be better resolved by an administrative body. In answering this question, the paper will not challenge the Review's underlying premise that Ontario's civil justice system is in crisis because of delays and the high cost of getting to trial, or that transferring parts of the existing civil justice caseload from the courts represents an effective way to deal with the problem. These assumptions have been thoroughly analyzed by Roderick Macdonald and by the other participants in the Law Reform Commission's November, 1994 Civil Justice Symposium.²

Rather, this paper will explore whether administrative agencies may because of institutional characteristics particular to them, provide a better forum for dealing with certain types of civil disputes, even where the civil court system is functioning well. To this end, the first part of the paper will examine the possible reasons for favouring administrative agencies over courts for resolving civil disputes. The second part of the paper will consider factors limiting the effectiveness of administrative agencies as alternatives to the courts, including the constraints imposed by section 96 of the *Constitution Act, 1867*,³ the increasing judicialization of the administrative process, and problems relating to the authoritativeness of administrative decision-making.

The third part of the paper will develop a set of criteria for identifying specific types of disputes that might be more effectively resolved through an administrative structure. On the basis of these criteria, the fourth part of the paper will examine residential tenancies as a specific example of an area of dispute which could be reallocated from the courts to an administrative agency, as well as the measures required to make this transfer of responsibility

¹ Ontario Civil Justice Review Terms of Reference (April 5, 1994).

² R.A. Macdonald, *Study Paper on Prospects for Civil Justice with Commentaries by H.W. Arthurs et al.* (Toronto: Law Reform Commission of Ontario, 1995); see also T.A. Cromwell, "Neither Out Far Nor In Deep": The Zuber Commission and the Problems of Civil Justice Reform" (1988) 37 *University of New Brunswick Law Journal* 94; and the essays contained in A.C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990), see especially. M.J. Mossman & H. Ritchie, "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship" in *ibid.* 53; A.J. Roman, "Barriers to Access: Including the Excluded" in *ibid.* 177; F.H. Zemans, "Making the Justice System Balance: Beyond the Zuber Report" in *ibid.* 237; "S.E. Merry, "Varieties of Mediation Performance: Replicating Differences in Access to Justice" in *ibid.* 257.

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

feasible and worthwhile. Other possible areas of dispute that might be more effectively dealt with by administrative agencies will also be canvassed briefly. The paper will conclude by asking whether, given the constitutional constraints which section 96 presents and current public attitudes towards administrative agencies in particular and the regulatory process in general, this approach to resolving problems on the province's civil justice system is likely to be successful.

2. FACTORS FAVOURING ADMINISTRATIVE AGENCIES OVER COURTS FOR THE RESOLUTION OF CIVIL DISPUTES

The ad hoc evolution of the Canadian administrative state has been well documented.⁴ Historically, administrative agencies were created by federal and provincial governments to meet a variety of needs. Some agencies, such as in the area of labour relations, were established to respond to inadequacies in the judicial or common law approach to particular litigants and legal problems, at a substantive, procedural or remedial level. Some were created to provide expanded investigative and enforcement powers, such as in the areas of commercial and occupational licensing and securities regulation. Others were designed to regulate important areas of economic activity, such as transportation, agricultural marketing, and urban development, which require the weighing of complex economic, social, and political considerations. Finally, a number of administrative agencies were put in place to address emerging areas of social concern, such as human rights and the environment, which call for specialized expertise and greater opportunities for public participation.⁵

A general characteristic of administrative agencies is the requirement that they take the public interest into account in their decision-making. As a result, administrative agencies with adjudicative responsibility display institutional and procedural characteristics not shared by courts.⁶ For instance, policy-making and administrative functions are often integrated into administrative dispute resolution processes.⁷ Administrative agencies frequently possess

⁴ See for example A.C. Cairns, "The Nature of the Administrative State" (1990) 40 *University of Toronto Law Journal* 319; D.J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1947 to 1984" in I. Bernier & A. Lajoie, Res. Coord., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 155; Law Reform Commission of Canada, *Independent Administrative Agencies* (Working Paper No. 25) (Ottawa: Law Reform Commission of Canada, 1980) at 17-32; Economic Council of Canada, *Responsible Regulation - An Interim Report* (Ottawa: Supply and Services Canada, 1979) at 9-22.

⁵ A complete list and description of the functions of the various administrative agencies in existence in Ontario can be found in Ontario, *Guide to Agencies, Boards and Commissions* (Toronto: Queen's Printer for Ontario, 1994).

⁶ For a comprehensive review of the role and functioning of administrative agencies in Ontario see R.W. Macaulay, *Directions: Review of Ontario's Regulatory Agencies* (Toronto: Queen's Printer for Ontario, 1989); R.W. Macaulay, *Practice and Procedures Before Administrative Tribunals* (Toronto: Carswell, 1994); and see also F.F. Slatter, *Parliament and Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1982) at 7-20; Law Reform Commission of Canada, *Independent Administrative Agencies*, *supra* note 4 at 33-47; Mullan, "Administrative Tribunals", *supra* note 4 at 155-159; M. Rankin, "Perspectives on the Independence of Administrative Tribunals" (1992) 6 *Canadian Journal of Administrative Law and Practice* 91 at 92-95; R. Dussault & L. Borgeat, *Traité de droit administratif*, 2d ed., Vol. 1 (Québec: Les Presses de l'Université Laval, 1984) 132-207.

⁷ For an extended discussion of this difference between judicial and administrative adjudication, see Macaulay, *Directions*, *supra* note 6 at 4.18-4.25; and see also W.A. Bogart, "Courts and Tribunals: Conflict and Co-existence" (1989) 8 *Civil Justice Quarterly* 7; H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall Law Journal* 1. For a discussion of the role of the courts within the Canadian

investigative, supervisory, enforcement and other powers beyond those ordinarily exercised by courts.⁸ This combination of functions allows them to manage rather than merely adjudicate disputes, and to respond actively to issues, such as power imbalances between the parties or the under-representation of certain interests not ordinarily addressed within the civil justice model.

Administrative agencies also differ from courts in terms of appointments. Both federal and provincial law require that judges be trained lawyers with lengthy practice experience.⁹ This requirement restricts the pool of eligible candidates and strongly influences the character and qualifications of those ultimately appointed to the bench, as well as the nature of the decision-making process itself.¹⁰ In contrast, administrative appointments can be tailored to a degree not possible in the courts. Priority can be placed on specific objectives, such as selecting appointees for in-depth knowledge or expertise in a specific area, appointing individuals with mediation, conciliation, or other special skills, or ensuring a decision-making body which is more representative of the racial, cultural, and socio-economic make-up of the province as a whole.

In general, the administrative process is also more flexible and open to innovation than its judicial counterpart. Civil court procedure is relatively formalistic, rigid and complex. These characteristics make it difficult for a party to undertake a civil action without the aid of a lawyer, adding to the delays and cost of getting to and through trial. In contrast, the administrative process is more flexible and pluralistic. Complexity and formality can be reduced, rules of evidence relaxed, procedures expedited, and alternatives to traditional adversarial-style adjudication, such as inquisitorial fact-finding, paper hearings, or mediation, more easily introduced.¹¹

Insofar as costs are concerned, civil court justice is expensive, both to the parties directly involved and to the tax-paying public.¹² As a rule, courts rarely do more than order a losing party to assume a portion of the winning party's legal fees. While the balance of their respective legal fees and other out-of-pocket litigation-related expenses are borne by the

governmental system, see P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).

⁸ For example, an agency such as the provincial Workers' Compensation Board is responsible for investigating, monitoring, advising, standard setting, as well as adjudicating claims in the area it oversees; *Workers' Compensation Act*, R.S.O. 1990, c. W.11, especially ss. 63, 65(3), 69, 74; and see generally S.R. Ellis, "Administrative Tribunal Design: Workers' Compensation Appeals Tribunal" (1988) 1 *Canadian Journal of Administrative Law and Practice* 134.

⁹ Russell, *The Judiciary in Canada*, *supra* note 7 at 160-164.

¹⁰ *Ibid.* at 23, and see also *infra* note 60.

¹¹ See generally, Law Reform Commission of Canada, *Independent Administrative Agencies*, *supra* note 4 at 119-141; Macaulay, *Practice and Procedures Before Administrative Tribunals*, *supra* note 6.

¹² See for example the *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995) at 125-154; "Workshop Reports" in Hutchinson, *Access to Civil Justice*, *supra* note 2 at 277; T.G. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer for Ontario, 1987) at 51-53; Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ontario Law Reform Commission, 1989) at 137-149; Ontario Law Reform Commission, *Report on Class Actions*, Vol. 1 (Toronto: Ontario Law Reform Commission, 1982) at 122-126.

disputing parties, the cost of maintaining the civil justice system falls upon the government, and ultimately upon provincial tax-payers.¹³

In contrast, administrative agencies have a much greater ability to control their budgets and to reallocate all or part of the financial cost of their proceedings.¹⁴ Thus, where it is seen as an unacceptable barrier to access, the cost of participating in an administrative proceeding (including the cost of legal services, if any) can be shifted from one party to another, or can be assumed entirely by the administrative agency in question. Conversely, where there is no compelling reason to subsidize an administrative dispute-resolution process, the full cost of such proceedings can be imposed on the parties, so that no portion remains to be borne by the government or by tax-payers.

Finally, the administrative process offers greater third-party participatory opportunities than does the civil justice system.¹⁵ Consistent with the bi-polar model of judicial dispute resolution, court proceedings are ordinarily limited to the parties directly affected -- the plaintiff and the defendant. Administrative dispute resolution processes on the other hand are frequently designed to maximize opportunities for public participation. In some cases this may be the major reason for creating an administrative agency in the first place. To this end, rules of standing are frequently relaxed, and often intervenor funding is made available for the express purpose of facilitating participation by interested individuals and groups.

In sum, the administrative dispute resolution process differs from the traditional judicial model in terms of functions, appointments process, procedural flexibility, cost-related considerations, and participatory opportunities. Each of these characteristics of administrative decision-making has the potential to respond to problems within the existing civil justice system -- to reduce delay and costs in resolving disputes, and to enhance the quality of decision-making and access to justice. Before considering these possible advantages of the administrative model further, however, its legal and functional limits must also be noted.

3. FACTORS LIMITING THE EFFECTIVENESS OF ADMINISTRATIVE AGENCIES AS AN ALTERNATIVE TO THE COURTS

While administrative agencies benefit from greater flexibility in functions, appointments, procedures, costs, and opportunities for participation, three factors weigh against administrative adjudication as an effective alternative to the courts in civil dispute resolution:

¹³ As discussed in Part 2a) of the paper, below, under section 96 of the *Constitution Act, 1867*, the federal government has the power to appoint judges to provincial superior courts, and also pays their salaries, pursuant to section 100. Under section 92(14), the provinces have jurisdiction in relation to "The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both civil and of criminal jurisdiction, and including procedure in civil matters in those courts", and the balance of the cost of maintaining the civil justice system therefore falls to the provincial treasuries.

¹⁴ For a discussion of this issue, see Macaulay, *Directions*, *supra* note 6 at 7.1-7.17.

¹⁵ See generally J. Frecker, "Administrative Tribunals and Access to Policy Development" (1992) 6 *Canadian Journal of Administrative Law and Practice* 69; Law Reform Commission of Canada, *Independent Administrative Agencies*, *supra* note 4 at 95-117; D. Fox, *Public Participation in the Administrative Process* (Ottawa: Law Reform Commission of Canada, 1979); S.K. McCallum & G. Watkins, "Citizens' Costs Before Administrative Tribunals" (1975) 23 *Chitty's Law Journal* 181; M. Valiante & W.A. Bogart, "Helping 'Concerned Volunteers Work out of their Kitchens': Funding Citizen Participation in Administrative Decision Making" (1993) 31 *Osgoode Hall Law Journal* 687; H.N. Janisch, "Administrative Tribunals in the 80's: Rights of Access by Groups and Individuals" (1981) 1 *Windsor Yearbook of Access to Justice* 303.

first, the impact of section 96 of the *Constitution Act, 1867*; second, the increasing judicialization of administrative decision-making; and, third, problems relating to the authoritativeness of the administrative process. Each of these factors will be addressed in turn.

(a) *SECTION 96 OF THE CONSTITUTION ACT, 1867*

Section 96 of the *Constitution Act, 1867* states that:

96. The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the courts of Probate in Nova Scotia and New Brunswick.

At first glance, the language of section 96 appears to provide simply for a federal executive power to appoint judges to provincial superior courts. However, as interpreted, section 96 has become the major bulwark of judicial independence vis-à-vis the executive and legislative branches.¹⁶ Among other things, section 96 has been read by the courts to place significant limits on the provincial legislatures' ability to confer adjudicative powers on provincially-created administrative agencies, even where matters of exclusive provincial jurisdiction are involved.¹⁷

In its 1981 decision in *Re Residential Tenancies Act, 1979*¹⁸ the Supreme Court of Canada put forward a three-part test for determining whether powers granted to a provincial administrative tribunal are in accordance with section 96. The first step involves a historical investigation of whether the matter to be conferred upon the tribunal was within the exclusive jurisdiction of the superior courts at the time of Confederation.¹⁹ If so, the second step involves an enquiry as to whether the function to be exercised by the tribunal is a "judicial" one. As Justice Dickson explains in his decision for the Court:

... the hallmark of a judicial power is a *lis* between the parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The

¹⁶ See generally W.R. Lederman, "The Independence of the Judiciary" in W.R. Lederman, *Continuing Canadian Constitutional Dilemmas - Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) 109, reprinted from (1956) 34 *Canadian Bar Review* 769-809, 1139-1179; R.A. Macdonald, "The Proposed Section 96B: An Ill-Conceived Reform Destined to Failure" (1985) 26 *Les Cahiers de Droit* 251; P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 185-200.

¹⁷ J.-F. Jobin, *L'article 96 de la Loi constitutionnelle de 1867 et les organismes inférieurs d'appel* (Cowansville: Les Éditions Yvon Blais, 1984); M.E. Hatherly, "The Chilling Effect of Section 96 on Dispute Resolution" (1988) 37 *University of New Brunswick Law Journal* 121; P. Garant, "L'article 96 de la Loi constitutionnelle de 1867" (1985) 26 *Les Cahiers de Droit* 217; G. Pépin, "The Problem of Section 96 of the Constitution Act, 1867" in C. Beckett & A.W. Mackay, Res. Coord., *The Courts and the Charter* (Toronto: University of Toronto Press, 1985) 223; N. Duplé, "L'article 96 de la Loi constitutionnelle de 1867 ou la pierre angulaire du système judiciaire canadien" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Law Reform Commission of Canada, 1991) 165; J.D. Whyte, "Federal-Provincial Tensions in the Administration of Justice" in P.M. Leslie, ed., *State of the Federation, 1985* (Kingston: Institute of Intergovernmental Relations, 1985) 173; P.W. Hogg, "Administration of Justice: An Introduction" in *Canada and the New Constitution*, Vol. 1 (Montreal: The Institute for Research on Public Policy, 1983) 91.

¹⁸ [1981] 1 S.C.R. 714 [hereinafter *Residential Tenancies*].

¹⁹ *Ibid.* at 734.

adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.²⁰

If the tribunal is found to be exercising a judicial function, the third step involves an analysis of the tribunal's mandate as a whole in order to "appraise the impugned function in its entire institutional context."²¹ In other words, the court must determine whether adjudication is the "sole or central function of the tribunal", or whether its judicial powers are "merely subsidiary or ancillary to general administrative functions assigned to the tribunal."²² Unless the tribunal's adjudicative function is deemed to be "necessarily incidental to the achievement of a broader policy goal of the legislature",²³ the grant of judicial powers to the provincially appointed tribunal will be found to offend section 96.

Upon examining the proposed Ontario *Residential Tenancies Act* in light of these principles, the Supreme Court found that most of the powers granted to the Residential Tenancy Commission failed all three parts of the test. First, at the time of Confederation the superior courts in Ontario had jurisdiction over landlord and tenant matters, and more specifically the power to order evictions and to settle disputes between landlords and tenants.²⁴ Second, the powers to be exercised by the Commission in relation to landlord and tenant disputes were judicial in nature. As Justice Dickson explained:

Virtually all of the provisions of the Act require that either a landlord or a tenant apply to the Commission before any action be taken ... When confronted with a lis, the task of the Commission will be to determine the respective rights and obligations of the parties according to the terms of the legislation ... At no point is the individual's right at law surrendered for the benefit of a common group or policy. The Commission deals exclusively with matters of contract and land law as they arise between landlords and tenants.²⁵

Finally, the Commission's other regulatory functions, such as mediating disputes, recommending policy, or dealing with rent review matters, were found to be either ancillary to or entirely distinct from its central function of adjudicating residential tenancy disputes.²⁶ In the Court's view, "the role of the Commission is not to administer a policy or to carry out an administrative function. Its primary role is to adjudicate."²⁷ Therefore, although the province has the authority under section 92(13) of the *Constitution Act, 1867* to legislate in relation to residential tenancies, the Supreme Court found that the powers conferred upon the

²⁰ *Ibid.* at 743.

²¹ *Ibid.* at 735.

²² *Ibid.* at 736.

²³ *Ibid.*

²⁴ *Ibid.* at 738.

²⁵ *Ibid.* at 743-744.

²⁶ *Ibid.* at 747.

²⁷ *Ibid.*

Commission to adjudicate landlord and tenant disputes were unconstitutional.²⁸ Left standing were the provisions of the *Act* relating to rent review, which the Court found unobjectionable.²⁹

In the early eighties, the political and legal controversy surrounding the Supreme Court's interpretation of section 96 prompted the federal Justice Department to circulate a discussion paper proposing a constitutional amendment in the form of a new section 96B, which would have enabled the provinces to grant provincial tribunals the power to adjudicate any matter within provincial legislative competence, so long as the tribunal's decisions remained subject to judicial review. This proposal met with considerable criticism from the Canadian Bar Association and a number of academic commentators and neither it nor alternative amendments to section 96 have been included in any subsequent set of constitutional reform proposals.³⁰

As it stands, section 96 constitutes a major obstacle to any effort to transfer civil disputes from the courts to administrative decision-makers, even in areas of exclusive provincial jurisdiction. By definition, civil dispute resolution involves the exercise of a "judicial" function, as characterized by Justice Dickson. In order to survive section 96 scrutiny, a transfer of judicial power to an administrative agency must therefore meet either the first or the third parts of the *Residential Tenancies* test. The matter at issue cannot have fallen within the exclusive jurisdiction of the superior courts in 1867. Alternatively, the grant of judicial power has to occur within a broader regulatory framework, so that adjudication is not the sole or dominant function of the administrative agency in question. Only where one or the other of these conditions is met will a reallocation of dispute resolution responsibilities from the courts to a provincially created administrative agency be constitutionally acceptable.

(b) THE INCREASING JUDICIALIZATION OF ADMINISTRATIVE DECISION-MAKING

As discussed in the first part of the paper, the potential for designing a decision-making process which is more flexible, straightforward and informal, and thereby more expeditious,

²⁸ *Ibid.* at 748. In a subsequent decision applying the *Residential Tenancies* test, Québec's Régie du logement was found constitutional by the Supreme Court of Canada on the grounds that landlord and tenant disputes were within the purview of the inferior courts in Québec at the time of Confederation; *A.G. (Québec) v. Grondin* [1983] 2 S.C.R. 238. In a decision currently on appeal to the Supreme Court of Canada, the Nova Scotia Court of Appeal struck down a proposed Residential Tenancies Board for that province on the grounds that it failed all three parts of the *Residential Tenancies* test; *Reference Re Residential Tenancies Act (N.S.)* (1994) 115 D.L.R. (4th) 129; leave to appeal granted (6 December 1994) Ottawa 24276 (S.C.C.).

²⁹ Rent review is now governed under the provisions of the *Rent Control Act, 1992*, S.O. 1992, c. 11. The *Act* sets out the requirements for providing notice of rent increases, sets maximum rent levels for all residential rental premises, continues the provincial Rent Registry which provides rental information on most rental units in the province, and establishes procedures for decision-making by rent officers under the *Act*; see generally, D.H.L. Lamont, *Residential Tenancies*, 5th ed. (Toronto: Carswell, 1993) 261-301.

³⁰ See Hon. M. MacGuigan, *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals* (Ottawa: Department of Justice, 1983); N. Lyon, "Is Amendment of Section 96 Really Necessary" (1987) 36 *University of New Brunswick Law Journal* 79; Canadian Bar Association, "A Response to the Suggested Amendment Relating to Provincial Administrative Tribunals" (1985) 26 *Les Cahiers de Droit* 223; G. Pépin, "L'irrecevabilité du projet de modification de l'article 96 de la Loi constitutionnelle de 1867" (1985) 26 *Les Cahiers de Droit* 239; Macdonald, "The Proposed Section 96B", *supra* note 16; Whyte, "Federal-Provincial Tensions in the Administration of Justice", *supra* note 17 at 183; D. Matas, "Validating Administrative Tribunals" (1984-85) *Manitoba Law Journal* 245.

inexpensive, and accessible, is a major attraction of administrative agencies over courts as a forum for resolving civil disputes. However, this relative advantage may to some extent be more theoretical than real. Numerous commentators have remarked upon the growing judicialization of administrative decision-making in Canada.³¹ The susceptibility of administrative procedures to judicial review for breach of natural justice and fairness,³² as well as their reviewability for conformity with the due process guarantees set out under section 7 of the *Canadian Charter of Rights and Freedoms*,³³ are partially responsible for this trend.

In Ontario, however, the move to greater formality and homogeneity in administrative decision-making, and particularly in administrative adjudication, is due primarily to the provisions of the *Statutory Powers Procedure Act (SPPA)*.³⁴ Adopted in 1971 following the recommendations of the McRuer Commission,³⁵ the *SPPA* imposes traditional court-like procedures whenever a provincial law empowers an administrative tribunal³⁶ to exercise a "statutory power of decision" in a proceeding where the parties involved have a right to be heard before a decision is made. Under section 1(1) of the *SPPA*, a "statutory power of decision" is defined as:

... a power or right, conferred by or under a statute, to make a decision deciding or prescribing:

³¹ See for example D.J. Mullan, "The Future of Canadian Administrative Law" (1991) 16 *Queen's Law Journal* 77; A.H. Young & R.A. Macdonald, "Canadian Administrative Law on the Threshold of the 1990's" (1991) 16 *Queen's Law Journal* 31; R.S. Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization?" (1989) 2 *Canadian Journal of Administrative Law and Practice* 1; R.A. Macdonald, "Reflections on the Report of the Québec Working Group on Administrative Tribunals (Ouellette Commission Report)" (1988) 1 *Canadian Journal of Administrative Law and Practice* 337 at 349-252; H.W. MacLauchlan, "Four Patterns of Change: Legalization, Democratization, Privatization and Regionalization" (1992) 6 *Canadian Journal of Administrative Law and Practice* 47; Rankin, "Perspectives on the Independence of Administrative Tribunals", *supra* note 6 at 111; H.N. Janisch, "Administrative Tribunals and the Law" (1989) 2 *Canadian Journal of Administrative Law and Practice* 263; Mullan, "Administrative Tribunals: Their Evolution in Canada", *supra* note 4 at 186-193; Macaulay, *Directions*, *supra* note 6 at 4.3-4.7.

³² See generally, D.J. Mullan, "Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 *McGill Law Review* 250; P. Garant & C. Dussault, "L'équité procédurale et la révolution tranquille du droit administratif" (1986) 16 *Revue de droit de l'Université Sherbrooke* 495; D.J. Mullan, "Natural Justice - The Challenges of Nicholson, Deference Theory and the Charter" in N.R. Finkelstein & B. MacLeod Rogers, eds, *Recent Developments in Administrative Law* (Toronto: Carswell, 1987).

³³ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. For a discussion of the impact of section 7 in the administrative context see: T.J. Christian, "Section 7 and Administrative Law" (1987) 3 *Administrative Law Journal* 25; I.G. Whitehall, "Administrative Tribunals and Section 7 of the Charter" in N.R. Finkelstein & B. MacLeod Rogers, eds., *Charter Issues in Civil Cases* (Toronto: Carswell, 1988) 257; J.M. Evans, "Developments in Administrative Law: the 1987-88 Term" (1988) 11 *Supreme Court Law Review* 1 at 47-55; D.J. Mullan, "Judicial Deference to Administrative Decision-Making in the Age of the Charter" (1985-86) 50 *Saskatchewan Law Review* 203; A.W. Mackay, "Fairness After the Charter: A Rose by Any Other Name?" (1985) 10 *Queen's Law Journal* 263; M. Jackman, "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process" (1990) 4 *Canadian Journal of Administrative Law and Practice* 23.

³⁴ R.S.O. 1990, c. S.22.

³⁵ *Royal Commission Inquiry into Civil Rights* (Toronto: Queen's Printer for Ontario, 1968) (Chair: Hon. J.C. McRuer), see especially Volume 1 at 206-235.

³⁶ "Tribunal" is defined under section 1(1) of the *SPPA* as "one or more persons ... upon which a statutory power of decision is conferred by or under a statute."

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
- (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or license, whether the person is legally entitled thereto or not;

This broad definition effectively captures any administrative process involving the adjudication of private interests.

Among the requirements which the *SPPA* imposes on such proceedings are the right to reasonable notice of a hearing, under section 6;³⁷ and the right to be represented by counsel or an agent,³⁸ to call and examine witnesses and present arguments and submissions, and “to conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence”, under section 10. Section 14 provides for protection against self-incrimination; and section 15 sets out rules governing the admissibility of evidence. Section 17 requires the tribunal to render its final decision in writing, and to give reasons in writing if requested to do so by a party. Section 20 of the *SPPA* requires the tribunal to compile a full record, including all documentary evidence, the transcript (if any) of the oral evidence given at the hearing, and its decision.

The *SPPA*’s attempt to replicate the judicial model in administrative tribunal decision-making has been subject to criticism on the grounds that it fosters an undue level of rigidity and formalism.³⁹ Following a series of recommendations made by Robert Macaulay in a review of Ontario’s regulatory agencies commissioned by Management Board of Cabinet in 1989, a number of amendments to the *SPPA* were included in the recently proclaimed *Statute Law Amendment Act (Government Management and Services), 1994*.⁴⁰ Hearings are now defined under the *SPPA* as including electronic, oral and written hearings;⁴¹ existing procedural requirement under the *SPPA* can be waived,⁴² and a proceeding can be disposed of without a hearing by consent of the parties.⁴³ Under the new provisions of the *SPPA*, a tribunal may direct the parties to participate in a pre-hearing conference;⁴⁴ proceedings involving similar questions of fact, law or policy may be consolidated;⁴⁵ a tribunal may limit

³⁷ Under section 24 of the *SPPA*, where the parties to a proceeding are so numerous as to make individual notice impracticable, the tribunal may give notice by public advertisement or other means.

³⁸ Section 23 of the *SPPA* gives the tribunal the discretion to exclude from a hearing anyone other than a lawyer appearing as an agent on behalf of a party or as an adviser to a witness.

³⁹ See for example Macaulay, *Directions*, *supra* note 6 at 4.5-4.6 and see also J. Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 *University of Toronto Law Journal* 351.

⁴⁰ S.O. 1994, c. 27, s. 56; the *Act* came into force on December 9, 1994.

⁴¹ *SPPA*, *supra* note 34 s. 1(1).

⁴² *Ibid.* s. 4.

⁴³ *Ibid.* s. 4.1.

⁴⁴ *Ibid.* s. 5.3.

⁴⁵ *Ibid.* s. 9.1.

examination or cross-examination;⁴⁶ and it may make rules governing its own practice and procedures.⁴⁷

The procedures imposed by the *SPPA* are designed to provide important due process safeguards for those involved in administrative proceedings. In doing so, however, the *Act* forces administrative agencies to behave much like courts. In many cases, this has created similar problems of undue formality, complexity, expense and delay. Notwithstanding the positive recent amendments to the *Act*, the judicialization of tribunal decision-making reinforced by the *SPPA*, judicial review, and the *Charter*, significantly affect the ability of administrative agencies to provide an effective alternative to the courts in civil dispute resolution.

(c) THE AUTHORITATIVENESS OF ADMINISTRATIVE DECISION-MAKING

A final factor weighing against the transfer of civil disputes from the courts to administrative agencies relates to the authoritativeness, real or perceived, of administrative as opposed to judicial decision-making. Historically, courts have been the ultimate arbiters of claims between private individuals, and between individuals and the state. The Diceyan conception of the rule of law which pervades our legal culture places courts and judges at the top of the adjudicative hierarchy.⁴⁸ The authoritativeness of judicial decision-making is guaranteed in two ways. First, the judiciary is constitutionally protected from political interference both at an institutional level and in terms of individual court decisions.⁴⁹ Second, judges possess the ultimate power to review the decisions of inferior tribunals, including administrative ones.⁵⁰ In contrast, the authoritativeness of administrative decision-making is

⁴⁶ *Ibid.* s. 23(2).

⁴⁷ *Ibid.* s. 25.1.

⁴⁸ In his famous constitutional law treatise, Dicey argued that the supremacy of law in the British constitutional tradition involved two major principles intimately bound up with the role of the courts:

When we say that the supremacy or the rule of law is a characteristic of the English constitution ... We mean, in the first place that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land ...

We mean in the second place ... that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1915) at 110-114; and see generally, Russell, *The Judiciary in Canada*, *supra* note 7 at 36-37.

⁴⁹ This general guarantee of constitutional independence is found in part under the provisions of section 96, but also pursuant to sections 99 and 100 of the *Constitution Act, 1867* which guarantees superior court judges security of tenure, and which requires that their salaries be fixed by Parliament; see Russell, *The Judiciary in Canada*, *ibid.* at 81-85; Lederman, "The Independence of the Judiciary", *supra* note 16.

⁵⁰ In addition to preserving the courts' traditional monopoly over adjudication, section 96 of the *Constitution Act, 1867* has been read to ensure that the courts continue to have an ultimate supervisory jurisdiction over administrative decision-makers. While statutes creating administrative agencies often contain privative clauses designed to prevent the courts from reviewing tribunal decisions for errors of fact or law, provincial efforts to insulate administrative agencies entirely from review have not been successful. The Supreme Court of Canada has held that as a matter of constitutional principle section 96 courts must retain the ability to ensure against excesses of jurisdiction by administrative decision-makers. See generally P.W. Hogg, "Judicial Review: How Much do we

reduced by the susceptibility of administrative agencies not only to judicial review, but to various forms of political oversight. Through its control over appointments and the salaries and tenure of agency members, the executive branch can exercise considerable influence over administrative decision-making. In addition, some statutes establishing administrative agencies grant the executive more direct powers to control agency decision-making, such as the power to issue directives, to hear appeals from, and to override tribunal decisions in individual cases.⁵¹

These types of political controls reflect the fact that administrative agencies perform policy-making and administrative as well as adjudicative functions, and that their decisions must serve the public interest, not merely the interests of the parties appearing before them. This public interest mandate explains the procedural deviations which the *SPPA* seeks to control, including those designed to introduce greater simplicity, flexibility and informality into administrative decision-making. However, for the public as well as for the parties to a dispute before an administrative tribunal, deviations from traditional judicial procedure may be seen not as a positive feature of administrative adjudication but rather as promoting secrecy, discretion, and unfairness in decision-making.

Similarly, the need to ensure that the public interest is protected through the existence and exercise of executive oversight may be viewed simply as an effort to promote the immediate political goals of the government in power. The perception of executive influence leading to partiality in decision-making is particularly true of the administrative appointments process, which is seen as especially vulnerable to political interference.⁵² Not surprisingly, much of the ongoing debate surrounding administrative agencies focusses on the issue of administrative independence from the executive branch in particular. The Law Reform Commission of Canada, the Canadian and Ontario Bar Associations, the Ouellette Commission in Québec, and many academic commentators have stressed the need to guarantee the independence of tribunal members, through reform of the appointments process, greater security of tenure, and enhanced, secure, and more uniform levels of remuneration.⁵³

Need?" (1974) 20 *McGill Law Journal* 157; R. Carter, "The Privative Clause in Canadian Administrative Law, 1944-1985: A Doctrinal Examination" (1986) 64 *Canadian Bar Review* 241.

⁵¹ See generally, Economic Council of Canada, *Responsible Regulation*, *supra* note 4 at 58-68; Law Reform Commission of Canada, *Independent Administrative Agencies*, *supra* note 4 at 73-93; L. Vandervort, *Political Control of Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1979); H.N. Janisch, "Independence of Administrative Tribunals: In Praise of Structural Heretics" (1988) 1 *Canadian Journal of Administrative Law and Practice* 1; J.E. Law, "Powers of the Governor in Council over Administrative Tribunals: Appeals and Directions" (1988) 1 *Canadian Journal of Administrative Law and Practice* 327; A.J. Roman, "Government Control of Tribunals: Appeals, Directives, and Non-Statutory Mechanisms" (1985) 10 *Queen's Law Journal* 476.

⁵² Jean-Francois Gosselin, "Le statut actuel des membres des tribunaux administratifs, ou la promenade au flambeau dans la poudrière" (1988) 1 *Canadian Journal of Administrative Law and Practice* 220; Rankin, "The Independence of Administrative Tribunals", *supra* note 6 at 107-109; S. Comtois, "L'évolution des principes d'indépendance et d'impartialité quasi judiciaire: récents développements" (1992) 6 *Canadian Journal of Administrative Law and Practice* 187.

⁵³ E. Ratushny, *Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada* (Ottawa: Canadian Bar Association, 1990); Canadian Bar Association - Ontario, *Submission to the Premier of Ontario Re: Appointments to Administrative Tribunals* (Toronto: Canadian Bar Association - Ontario, 1988); Rapport du Groupe de travail sur les tribunaux administratifs, *Les tribunaux administratifs: l'heure est aux décisions* (Québec: Gouvernement du Québec, 1987) (Chair: Y. Ouellette); E. Ratushny, "What are Administrative Tribunals? The Pursuit of Uniformity in Diversity" (1987) 30 *Canadian*

The fact that administrative agencies are seen to occupy a lesser place in the judicial hierarchy, that they are designed to fulfil a public interest mandate, and that they lack the constitutional safeguards of an independent judiciary, contribute to the popular perception that administrative tribunals provide "second-class" justice.⁵⁴ The view that administrative rulings are less authoritative than judicial ones and that administrative tribunals are an inferior and less desirable forum for dispute resolution represents a significant obstacle to any effort to transfer civil disputes now before the courts to administrative agencies.

Some administrative agencies, such as the Ontario Human Rights Commission, have an effective monopoly over the area of disputes which they adjudicate. In the case of the Human Rights Commission, this is the result of the Supreme Court of Canada's ruling that the Ontario *Human Rights Code*⁵⁵ implicitly excludes common law actions and remedies for discrimination.⁵⁶ As a result human rights claims in the province must be brought through the specialized administrative procedure set out under the *Code*. In other areas, such as workers' compensation, provincial laws reallocating disputes from the courts to an administrative agency explicitly displace pre-existing common law remedies.⁵⁷

This is, however, a problematic response to the issue of administrative authoritativeness. It might be argued that the superior courts' ability to invoke section 96 to preclude competition in public adjudication has contributed to the present inefficiencies in the civil court system. Because of the potential for similar problems to develop where administrative monopolies are granted, particularly in terms of ongoing responsiveness and accountability to the parties involved, care should be exercised in deciding whether or not to abrogate a pre-existing civil cause of action. In the absence of strong public interest reasons for eliminating them, such as the risk that weaker parties will be disadvantaged by allowing continued access to the courts, common law remedies should arguably continue to be available as a parallel recourse to any new administrative procedure.⁵⁸

In summary, parties to disputes now dealt with by the courts may object to proposals to transfer adjudicative responsibility for resolving such matters to an administrative agency, notwithstanding the problems of cost and delays in the civil court system. The legal profession

Public Administration 1 at 10-12; Law Reform Commission of Canada, *Independent Administrative Agencies*, *supra* note 4 at 159-172; Mullan, "Administrative Tribunals: Their Evolution in Canada from 1947 to 1984", *supra* note 4.

⁵⁴ See for example D. Jacoby, "Les tribunaux administratifs vus par les citoyens" (1989-1990) 3 *Canadian Journal of Administrative Law and Practice* 327; Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ontario Ministry of Citizenship, 1992) (Chair: M. Cornish) at 94; T. Landau, *Public Complaints Against the Police: A View from Complainants* (Toronto: Centre for Criminology, University of Toronto, 1994) at 77-78.

⁵⁵ R.S.O. 1990, c. H.19.

⁵⁶ *Board of Governors of Seneca College v. Bhadauria* [1981] 2 S.C.R. 181.

⁵⁷ *Workers' Compensation Act*, *supra* note 8 s.16.

⁵⁸ In its report, *Achieving Equality*, *supra* note 54 at 94-95, the Ontario Human Rights Code Review Task Force argued that there were strong reasons not to amend the *Human Rights Code* to allow human right claims to go to the courts as civil actions. In particular, the Task Force pointed to the lack of knowledge and understanding of human rights in the courts; the need for more expert, less legalistic decision-making; and the existing costs and delays involved in civil court actions. For a *contra* view, see however L. Léger, "La Culture de la common law au-delà du 20^e siècle: comment le droit des délits peut-il répondre aux besoins d'une société pluraliste" (1992) 24 *Ottawa Law Review* 437.

may also oppose any proposal to move civil disputes into an administrative forum in which their services will no longer be as essential.⁵⁹ As discussed above, administrative agencies are perceived to be less commanding of respect than courts. They are seen as occupying a lesser place in the judicial hierarchy and as being more vulnerable to political interference. These public perceptions operate to further limit the effectiveness of administrative agencies as an alternative to the courts for resolving civil disputes.

4. CRITERIA FOR REALLOCATING CIVIL DISPUTES FROM COURTS TO ADMINISTRATIVE AGENCIES

The opening section of the paper outlined a number of institutional features which give administrative agencies potential advantages over courts in dealing with certain types of civil disputes. First, it was suggested that administrative agencies are generally designed to perform policy-making and administrative, as well as judicial functions. This mix of functions enables administrative agencies to assume a more pro-active role in responding to problems which might, in the ordinary court setting, appear simply as matters of recurring dispute between private parties. Second, the administrative process offers much greater latitude in terms of appointments. In contrast to a generalist judiciary drawn exclusively from the senior ranks of the legal profession, administrative appointees can be drawn from a much wider pool of candidates, and can be selected to meet particular objectives, such as the need for specialized knowledge, expertise, balance, diversity or accountability.

Third, notwithstanding the impact of the *Statutory Powers Procedure Act*, administrative agencies generally remain more flexible and open to experimentation than are courts in terms of their procedures. Complexity and formality can be held to the minimum required by the *SPPA*, and alternatives to traditional adjudication can be more easily introduced. Fourth, administrative agencies have a greater ability than courts to control and reallocate the costs of their proceedings. All or part of the cost of an administrative dispute resolution process can be absorbed by the adjudicating agency, redistributed between, or imposed entirely upon the parties depending on the public interest considerations involved. Finally, dispute resolution in the administrative setting can be structured to expand opportunities for public participation in a way which is more difficult to achieve within the existing civil court model. Working backwards from these features of administrative decision-making, it is possible to develop a series of criteria for deciding what types of civil disputes should be allocated to administrative decision-makers, to meet the stated objectives of the civil justice review: reducing delay and costs in civil dispute resolution, enhancing the quality of decision-making, and increasing access to justice.

Based on the functional differences between courts and administrative agencies, a first possible criterion for making a decision to reallocate a particular area of dispute is whether its effective resolution requires intervention of a non-judicial nature, which the courts cannot easily provide. As discussed earlier, administrative agencies have the advantage of being able to regulate rather than merely adjudicate matters which they oversee. Unlike courts, administrative agencies need not wait passively while a dispute develops to the point of

⁵⁹ See for example, B. Garth, "The Market for Court Reform: A Comment on Professor Macdonald's Paper and Court Reform in Ontario", in Macdonald, *Prospects for Civil Justice*, *supra* note 2 at 219; P.H. Russell, "The Politics of Civil Justice Reform in Ontario", in *ibid.* at 253; Cromwell, "The Zuber Commission", *supra* note 2 at 106-108.

generating a need for public adjudication. Rather, administrative agencies can intervene in advance to head-off such disputes by modifying the regulatory climate within which they might occur. Once a dispute is in existence, an administrative agency can also play a more pro-active role in managing it, through the use of investigative powers, the imposition of conciliation or mediation requirements, or the design of the actual hearing process. While adjudicating disputes administrative agencies can behave differently than courts, for instance by compensating for power imbalances between the parties. Finally, unlike courts, administrative agencies can implement their own decisions through a variety of regulatory and administrative devices and monitor the parties' ongoing compliance with any order.

A second criterion for identifying civil disputes that might better be resolved by an administrative agency relates to the respective qualifications of judicial and administrative decision-makers. As mentioned above, judges must first be senior members of the legal profession. This requirement severely restricts the pool of eligible candidates in terms of their prior education, training and experience, and also in terms of their socio-economic background, cultural and racial affiliations, and ideological pre-dispositions.⁶⁰ Where a dispute might more expeditiously or effectively be decided by someone other than a judge, including someone with a background and expertise in an area other than law, a strong case can be made for the transfer of adjudicative responsibility from the courts to an administrative agency.

A third possible criterion for transferring adjudicative responsibility in a particular area to an administrative agency is whether the relative informality and flexibility of administrative procedures constitutes an important advantage in a particular area of dispute. Where, for example, a dispute involves factual questions or legal principles which are relatively straightforward in nature, the greater informality of administrative procedure may generate important savings of time and expense for the parties and for the state. Even in complex cases where more pluralistic or innovative forms of procedure would enable issues to be more efficiently and expeditiously resolved, administrative agencies may possess advantages over courts.

A fourth possible criterion for reallocating an area of civil disputes to an administrative agency relates to the cost of the dispute resolution process. Administrative adjudication should be favoured over the judicial process whenever costs present either an undesirable barrier or an insufficient deterrent, to the resolution of disputes through a publicly subsidized forum. As discussed earlier, where it is in the public interest to eliminate the financial burden of civil dispute resolution for one or both parties, the administrative process offers a much larger range of options for doing so. Alternatively, where there is no compelling reason to subsidize

⁶⁰ See Russell, *The Judiciary in Canada*, *supra* note 7 at 162-166; M. Brown, *Gender Equality in the Courts* (Winnipeg: Manitoba Caucus of the National Association of Women and the Law, 1978); Hon. B. Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 *Osgoode Hall L.J.* 507; I. Grant & L. Smith, "Gender Representation in the Canadian Judiciary" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice*, *supra* note 17 at 57; E.P. Mendes, "Promoting Heterogeneity of the Judicial Mind: Minority and Gender Representation in the Canadian Judiciary", *ibid.* at 91; Report of the Royal Commission on the Donald Marshall Jr. Prosecution (Halifax: Province of Nova Scotia, 1989); "Workshop Reports: Gender" in Hutchinson, *Access to Civil Justice*, *supra* note 2 at 281-284; M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994) 2 *Review of Constitutional Studies* 76 at 91-94.

any portion of a dispute resolution process, administrative agencies are also better equipped than are the courts to assess and to pass on their costs to the parties.⁶¹

A final criterion for allocating civil disputes between the courts and administrative agencies is the need for greater opportunities for public participation in decision-making in a particular area. When a dispute involves significant third party or collective concerns, administrative agencies may be better equipped and more willing than the courts to broaden participatory opportunities through a range of devices including alternative hearing formats or intervenor funding. Where adequate public interest representation in a particular area of dispute requires such affirmative measures to be taken, administrative agencies may represent a preferable alternative to the courts.

5. THE REALLOCATION OF CIVIL DISPUTES IN THE AREA OF RESIDENTIAL TENANCIES

On the basis of the above-enumerated criteria, the following section of the paper will examine residential tenancies as a specific example in which disputes now being dealt with by the courts might better be resolved by an administrative agency. After identifying problems with the existing allocation of responsibility to the courts, the paper will consider the advantages of reallocating landlord and tenant disputes to an administrative agency, as well as the measures required to make such a transfer of responsibility feasible and worthwhile, given the issues discussed in the second part of the paper.

(a) RESIDENTIAL TENANCIES DISPUTES BEFORE THE COURTS

In an excellent recent report for the Ontario Ministry of Housing,⁶² Julie Macfarlane undertook a comprehensive review of the effectiveness of the current civil court process for resolving residential tenancies disputes. While the object of the Macfarlane study was to consider alternative dispute resolution options for the landlord and tenant context,⁶³ many of Macfarlane's findings are of direct relevance to the issue of whether residential tenancies disputes might be more effectively resolved in an administrative setting.

The most arresting fact to emerge from Macfarlane's study is the proportion of disputes brought by landlords and tenants respectively. In Macfarlane's study sample of 400 cases filed in the London courthouse during 1992, the vast majority (92 percent) of disputes were actions by landlords for eviction and/or arrears of rent.⁶⁴ Only one percent of actions (for example,

⁶¹ For an argument that the courts should take a similar approach, see Arthurs, "Comment on Prospects for Civil Justice", in Macdonald, *Prospects for Civil Justice*, *supra* note 2 at 179; and see also M.J. Trebilcock, "An Economic Perspective on Access to Civil Justice" in *ibid.* 279 at 283ff.

⁶² J. Macfarlane, *The Landlord/Tenant Dispute Resolution Project - Final Report and Recommendations* (Toronto: Ontario Ministry of Housing, May 1994) [hereinafter *Final Report*].

⁶³ The Macfarlane study took as a given that government support for the adoption of a new administrative framework for resolving landlord and tenant disputes was unlikely, and that such an alternative framework would also be open to constitutional challenge; *ibid.* at 20.

⁶⁴ *Ibid.* at 63-64. 85% of actions were filed by corporate landlords/property managers, and 14% by private landlords; *ibid.* at 61.

for failure to carry out repairs) were brought by tenants.⁶⁵ And, of the total number of actions brought by landlords, less than one in three was defended.⁶⁶ Macfarlane's statistics on the disproportion of landlord-initiated and undefended actions are largely borne out by an empirical study of landlord and tenant matters filed in the General Division office in Toronto, conducted by the provincial Ministry of the Attorney-General for the Civil Justice Review.⁶⁷

Macfarlane's study also highlights significant intra- and inter-regional disparities in tenants' access to a judicial hearing to defend against landlords' actions. Under the current provisions of the *Landlord and Tenant Act*,⁶⁸ the first appearance in a residential tenancy action is before a registrar at the local courthouse.⁶⁹ If the tenant does not appear at the first registrar's hearing, a default judgment will be issued pursuant to sub-section 113(7) of the *Act*. If the tenant does appear, he or she will be entitled to have the matter heard by a judge only if the registrar concludes that there is a "dispute" over the grounds for the application.⁷⁰ Subsection 113(6) of the *Act* is also often wrongly interpreted by registrars to require a tenant to pay into court in full any arrears of rent claimed by the landlord, regardless of the grounds upon which the tenant is disputing the landlord's claim, before a judge will hear the matter.⁷¹

A comparative survey of courthouse practices in London and Toronto, found significant differences in the interpretation and application of these provisions within and between regions. Combined with the pressure on registrars in certain areas to keep the number of cases sent for trial to a minimum,⁷² tenants' access to a hearing before a judge was found to be generally restricted—seriously in some cases.⁷³ For instance, data from the University Avenue Courthouse in Toronto showed that 21 percent of cases filed were withdrawn or presumed settled. Of the cases proceeded with, only 17 percent were sent for trial before a judge.⁷⁴ Of

⁶⁵ *Ibid.* at 61.

⁶⁶ *Ibid.* at 65.

⁶⁷ Study on file with the Ontario Ministry of the Attorney General, Policy Development Division.

⁶⁸ R.S.O. 1990, c. L.7. For a general discussion of the residential tenancies provisions of the *Landlord and Tenant Act* and related legislation, see Lamont, *Residential Tenancies*, *supra* note 29; M. Butkus, *The Annotated 1995 Ontario Landlord and Tenant Act* (Toronto: Carswell, 1995); R.G. Doumani & C.A. Albert, *Ontario Residential Tenancies Law* (Toronto: Carswell, 1994). For a brief discussion of the landlord and tenant regimes in effect in other provinces and outside Canada, see Macfarlane, *Final Report*, *supra* note 62 at 31-35; see also K.J. Dore, "The Rentalsman as an Alternative to the Courts in Landlord and Tenant Dispute Resolution" (1988) 37 *University of New Brunswick Law Journal* 146.

⁶⁹ *Landlord and Tenant Act*, *ibid.* s. 113.

⁷⁰ *Ibid.* s. 113(10).

⁷¹ Subsection 113(6) of the *Act*, *ibid.*, provides in relevant part that: "No dispute to a claim for arrears of rent ... may be made by the tenant ... on the grounds that the landlord is in breach of an express or implied covenant unless the tenant has first paid to the local registrar the amount of the rent and compensation claimed to be in arrears ..."

⁷² Macfarlane makes particular reference to the policy guidelines issued by the Senior Regional Justice to registrars at the University Avenue courthouse in Toronto, which have resulted in a reduction in the number of cases being sent for trial there; *Final Report*, *supra* note 62 at 55.

⁷³ *Ibid.* at 47-59; 86-94.

⁷⁴ *Ibid.* at 62-63.

the 400 sample applications in London, 39.5 percent (158) were withdrawn and presumed settled; 60.5 percent (242) proceeded to a hearing before the registrar, and only 10 disputes (4.1 percent of the cases heard by the registrar) went to trial before a judge.⁷⁵

In an observation study of four different Ontario courthouses on the interpretation of the “dispute” requirement under the *Act*, wide variations were also found. Practices ranged from requiring only that a tenant say “I dispute” before referring the matter for a judicial hearing, to enquiring into the merits of a disputing tenant’s position before referring the case to a judge, to attempting to mediate disputes, to informing tenants in arrears that there was no alternative but to give judgment for the landlord.⁷⁶ On the issue of payment into court, practices varied from registrars invariably requiring payment into court regardless of the basis of the dispute, to requiring payment into court only where the tenant was alleging a breach of covenant, to never requiring payment into court.⁷⁷ On the basis of the study’s findings, Macfarlane concluded:

These inconsistencies ... give cause for concern that tenants and landlords in different regional centres are receiving differential justice ... Ironically, it would appear that the consistency which is the stated goal, and an important part of the rationale of the formal justice system, is not currently being achieved in relation to landlord and tenant matters.⁷⁸

Although they are dramatically over-represented among applicants, landlords surveyed in the Macfarlane study nevertheless complained that the procedure for bringing residential tenancy actions was highly legalistic, dauntingly complex, and unreasonably slow.⁷⁹ Most felt obliged to resort to lawyers or para-legals for assistance in managing the process.⁸⁰ Most also perceived the system to be biased in favour of tenants.⁸¹ Complexity of the process and confusion over the legal forms and procedures involved were also among the principal reasons cited by tenants for their failure to initiate and to defend complaints, along with their general lack of knowledge about tenant rights and responsibilities under residential tenancy agreements.⁸²

Contrary to a widespread perception among landlords that tenants have easy and regular access to free legal advice and representation, in only three of the 400 sample cases in London were tenants reported as being represented by a lawyer or agent.⁸³ Macfarlane found that, upon receipt of a notice of application for termination, most tenants simply choose to move out, even in those cases where a good defence to the landlord’s action might be made:

⁷⁵ *Ibid.* at 62.

⁷⁶ *Ibid.* at 86-94.

⁷⁷ *Ibid.* see also J. Fleming, “Payment into Court under Section 113(6) of the Landlord and Tenant Act” (1992) 8 *Journal of Law and Social Policy* 82.

⁷⁸ Final Report, *ibid.* at 87.

⁷⁹ *Ibid.* at 68-79.

⁸⁰ *Ibid.* at 68-73.

⁸¹ *Ibid.* at 77-79.

⁸² *Ibid.* at 79-86.

⁸³ *Ibid.* at 65.

"Tenants explained their reluctance to participate as stemming from intimidation of court proceedings, and a widespread perception that their appearance would make no difference in any case."⁸⁴

In terms of actual outcomes, Macfarlane found that while, at first glance, the existing system is highly effective for landlords, the end-result in most cases was unsatisfactory -- an empty apartment and little or no payment of arrears of rent. In the study sample, 96 percent of cases proceeded with resulted in an order in the landlord's favour.⁸⁵ However, a follow-up study of successful judgements found that only 40 percent of landlords collected the rent arrears in full (with a 30-50 percent fee payable to collection agencies in most of those cases) and that 29 percent of landlords collected nothing at all.⁸⁶ This situation is attributed in part to the inflexibility of the current system. The range of orders available to a registrar or judge is very limited. In the case of arrears of rent, for instance, the full amount becomes payable within 7 days after the service of judgment. Any other arrangement depends on informal undertakings by the parties.⁸⁷

Macfarlane's findings about the cost to the system of dealing with residential tenancies disputes are also revealing. In general terms, Macfarlane suggests that the "many formal requirements of the current landlord and tenant procedure inevitably result in a huge administrative load for the court officers and for the litigation and counter clerks."⁸⁸ Many hours are spent by court staff responding to telephone and counter enquiries. Swearing of documents, which takes up a considerable amount of counter staff time, is free, even for paralegals who rely on this service to keep their charges to clients low. Time is also spent completing procedures for payment into and out of court.⁸⁹ In terms of administrative staff time costs alone,⁹⁰ Macfarlane concludes that these range from \$28 (for a file which moves through the process without any queries or problems) to \$127.68 per file up to the first hearing stage, with significant additional costs for applications which proceed to a hearing before a judge.⁹¹ On the issue of the cost to government of the current system, the Macfarlane study concludes that:

... it appears likely that in a majority of cases, internal administrative costs exceed the \$45 filing fee to the applicant. In some cases (for example where a case goes to a second hearing or a trial) this may be by as much as 200%. The balance is obviously made up in public funds. It is important to

⁸⁴ *Ibid.* at 4.

⁸⁵ *Ibid.* at 62.

⁸⁶ *Ibid.* at 75-76.

⁸⁷ *Ibid.* at 94-96.

⁸⁸ *Ibid.* at 98.

⁸⁹ *Ibid.* at 100-107.

⁹⁰ Staff costs were calculated by Macfarlane based on the time required, at a mid-range salary and benefit level, for the individual (litigation clerk or hearing officer) carrying out the relevant administrative task; *ibid.* at 107-108.

⁹¹ *Ibid.* at 109-111.

recognize, therefore, that the use of and access to the court process is publicly subsidised for many applicants.⁹²

In terms of costs to the parties, as suggested above, most landlords feel compelled to obtain legal or para-legal assistance in pursuing their claims. Insofar as tenants are concerned, Macfarlane's survey of courthouse practices in relation to orders for costs found that some registrars regularly include an amount (ranging from \$25 - \$50) to cover para-legal professional fees, payable by tenants when judgment is issued against them.⁹³

(b) ADVANTAGES OF MOVING RESIDENTIAL TENANCIES DISPUTES INTO AN ADMINISTRATIVE FORUM

The foregoing survey points to a number of justifications for transferring residential tenancies disputes from the courts to an administrative agency. Applying the first criterion developed in the preceding section of the paper, the functional pluralism characteristic of administrative agencies offers several advantages in the landlord-tenant context. Perhaps most significantly, an administrative agency would have a much greater ability to undertake steps to prevent landlord and tenant disputes from developing in the first place.

In this regard, Macfarlane's conviction, shared by all the community workers she spoke with, "that better access to advice on the legality or illegality of certain actions by both landlord and tenant could avert many disputes before they escalate into court action"⁹⁴ illustrates the importance of information and education-related initiatives in this area. An administrative agency would be in a far better position than the courts to develop and provide programs (including independent legal advice services) designed to educate landlords and tenants about their respective rights and responsibilities under provincial legislation. While the agency would be supplementing services already provided by community legal aid clinics and landlord or tenant advocacy groups in some larger centres, such services are not yet available in many smaller communities. Macfarlane's research suggests that where concerted efforts are made in this direction, the number of landlord and tenant disputes reaching the courts is significantly reduced.⁹⁵

Once landlord-tenant disputes arise, an administrative agency's functional flexibility would also permit it to manage them more purposefully and effectively. This is an especially

⁹² *Ibid.* at 111.

⁹³ *Ibid.* at 88-89.

⁹⁴ *Ibid.* at 83-84. Section 124 of the *Landlord and Tenant Act* allows for municipalities to establish Landlord and Tenant Advisory Bureaus, which can provide information, education, and mediation services, but which have no formal supervisory or remedial powers; see Doumani & Albert, *Ontario Residential Tenancies Law*, *supra* note 68 at 4-172.

⁹⁵ *Final Report*, *ibid.* at 46. Similar responsibility to provide information to landlords and tenants about their respective rights and obligations are among the statutory responsibilities of Québec's Régie du logement, which also include, under section 5 of the *Act*, responsibility for deciding landlord-tenant claims, for encouraging conciliation between landlords and tenants, for undertaking studies and developing statistics on the housing situation in the province, and for publishing the decisions of registrars on a periodic basis; *Loi instituant la Régie du logement*, L.Q. 1979, c. 48; see also S. Laflamme, "La Loi instituant la Régie du logement" (1984) 1 *Cours du perfectionnement du notariat* 97; T. Rousseau-Houle & M. Billy, *Le Bail du logement: analyse de la jurisprudence* (Montréal: Wilson et Lafleur ltée, 1989).

important consideration in view of the extreme under-representation of tenant actions within the current judicial system, as well as widespread concerns about complexity, delays and inconsistency in the current process. As stated earlier, only one percent of actions are brought by tenants against their landlords, and most actions by landlords go undefended. This suggests a strong need for a forum which is far more accessible to tenants for dealing with complaints against their landlords.

Tenant non-appearance rates also point to the need for better mechanisms for inquiring into the substance of residential tenancies claims as soon as they are filed, rather than relying entirely on information provided in the landlord's initial application, or in oral evidence during an *ex parte* appearance before a registrar. As Macfarlane suggests:

Landlord and tenant disputes appear to be fairly uni-dimensional; ie. the vast majority of disputes focus on arrears. In reality, each dispute is far more multi-dimensional and often arises as a result of a sequence of misunderstandings and conflicts. The adjudicative model simply accepts the simplistic characterization of most disputes as arrears disputes; [however] an investigative approach would better uncover the causes of conflict.⁹⁶

Carefully crafted inquisitorial or investigative mechanisms would help to redress the current imbalance in the number and type of residential tenancies actions, by enabling tenants to raise a valid defence to landlords' claims more easily in individual cases, as well as by allowing for investigation of more systemic patterns of complaints. Such investigative tools would also constitute a necessary part of the framework for a well-balanced and authoritative process for mediating landlord-tenant claims.

The potential role for mediation within the system for dealing with landlord and tenant disputes is underscored by Macfarlane's finding that over 85 percent of landlords and tenants interviewed for the study felt that mediation would have dealt with their claim as effectively as the court process.⁹⁷ Mediation, as Macfarlane points out, by-passes the negative features of the adversarial process and allows for the resolution of disputes in a manner that preserves relationships and promotes consensual and realistic agreements.⁹⁸ An administrative agency would be in a far better position than the courts to design and implement an effective mediation process of the type proposed in the Macfarlane study: one which involves trained and highly competent mediators, and which is expeditious, sensitive to the power imbalances between the parties, and authoritative.⁹⁹

The greater and more flexible range of remedial and enforcement options available to an administrative agency also presents advantages in the residential tenancies context, since the preferred outcome in many cases will be a positive ongoing relationship between the parties. In such situations, an administrative agency's ability to issue more flexible orders, and then to follow them up, including its ability to monitor and enforce mediated settlements, represents a net improvement over the existing non-interventionist approach of the courts in landlord-tenant cases. Given Macfarlane's statistics on judgment and collection rates within the current

⁹⁶ Comment by Julie Macfarlane to the author, June 22, 1995.

⁹⁷ *Final Report*, supra note 62 at 198.

⁹⁸ *Ibid.* at 143.

⁹⁹ *Ibid.* at 197-207.

system,¹⁰⁰ it is probable that a more managed process for dealing with residential tenancies disputes from beginning to end would lead to more favourable outcomes for both landlords and tenants.

In terms of the second criterion relating to appointments, developed earlier, transferring responsibility for dealing with residential tenancies matters to an administrative agency would permit the substitution of a cadre of specialist decision-makers for the current mix of court officials and judges now adjudicating such disputes. Unlike judges, those appointed to an administrative agency overseeing residential tenancies disputes would not need to be drawn exclusively from the senior bar. Instead, appointees could be selected for a sound understanding of residential tenancies legislation and issues, whether acquired through prior legal experience or not. Unlike the current judiciary, administrative appointees could also be more reflective of the diversity, socio-economic and otherwise, of residential tenants in the province. In addition to bringing greater expertise in landlord and tenant issues to the decision-making process in individual cases, creation of a cadre of specialist decision-makers would facilitate a redefinition of the decision-maker's role through the introduction of mediation and consensus building skills, and would also promote greater consistency and coherence in the performance of the agency's other functions.

In terms of the third criterion outlined earlier, there is an obvious need to simplify and expedite procedures for dealing with residential tenancies disputes. As mentioned earlier, for a vast majority of landlords complexity of the process is a primary source of dissatisfaction with the current system.¹⁰¹ Landlords also complain that procedures are unduly cumbersome and time-consuming. In the diplomatic words of one landlord interviewed for the Macfarlane study: "very rarely is a situation resolved quickly."¹⁰² For their part, tenants point to the incomprehensibility and intimidating formality of the court process, a significant factor in their unwillingness to bring claims or to defend against landlord actions. As Macfarlane puts it, tenants "feel overwhelmed by their ignorance of the proceedings and their relative lack of power."¹⁰³

The ability to design and institute more rational and effective procedures for dealing with landlord and tenant complaints is a strong reason to move these disputes out of the courts and into an administrative agency. As discussed earlier, within the limits imposed by the *Statutory Powers Procedure Act*, the administrative process has the advantage of being more flexible than the judicial one. In the case of residential tenancies, procedures can be designed to reflect the specific context and particular characteristics of landlord-tenant disputes. Procedures can be structured and implemented by the agency to be as straightforward and comprehensible as possible, so that neither party is required to obtain legal assistance merely to navigate the system. Formality can be held to a minimum, and efforts made to guard against the sense of intimidation and powerlessness now experienced by tenants in the courts. Statutory notice and waiting periods can be fully enforced, while process-based delays are held to a minimum. In short, transferring responsibility for residential tenancies disputes from the courts to an administrative agency would allow for the design and implementation of procedures that are

¹⁰⁰ See *supra* note 85-86.

¹⁰¹ *Ibid.* at 69-70.

¹⁰² *Ibid.* at 72.

¹⁰³ *Ibid.* at 80.

more informal, straightforward, expeditious, and fair, in order to remedy the shared sense among both landlords and tenants that the current system is not only unresponsive, but biased.

In terms of the fourth criterion relating to costs, measures can more easily be taken by an administrative agency to eliminate costs due to unnecessary procedural delay and complexity. It was recommended earlier that the agency's mandate include providing independent legal advice free of charge to landlords and tenants as a way of forestalling unnecessary disputes. Once procedures have been rationalized and information, advice and mediation services put in place, fee schedules can be established that more accurately reflect the real cost of providing services, in order to ensure that landlords do not continue to be unreasonably subsidized by tax-payers in their use of the adjudicative component of the system.

In terms of the final criterion, enhancing participatory opportunities in decision-making, a move to an administrative agency also offers advantages in the residential tenancies context. As discussed above, the current system is seriously unbalanced, with a disproportionate number of undefended landlord actions and a very small number of proceedings initiated by tenants. The range of non-judicial mechanisms available to an administrative agency to remedy this situation has been identified as a major reason to move landlord and tenant disputes out of the courts. Where disputes between landlords and tenants involve matters of an ongoing or systemic nature, such as the widespread practice of relying on minimum income criteria currently under review by the Ontario Human Rights Commission,¹⁰⁴ an administrative agency will also be in a better position than the courts to facilitate and even to subsidize third-party participation, such as by non-profit groups advocating on behalf of tenants' interests.

(c) MEASURES REQUIRED TO MAKE THE REALLOCATION OF LANDLORD AND TENANT DISPUTES FEASIBLE AND WORTHWHILE

The first and most significant barrier to the reallocation of residential tenancies disputes from the courts to an administrative agency is the impact of section 96 of the *Constitution Act, 1867*. As discussed in the second part of the paper, a previous attempt by the province of Ontario to confer responsibility for adjudicating landlord and tenant disputes on a provincially appointed administrative tribunal was rejected in the *Residential Tenancies* case. The Supreme Court of Canada found that the provincial legislation did little in the way of increasing regulatory oversight or control over landlord-tenant matters, except with regard to rent review. In the Court's view, under the proposed Ontario legislation the Residential Tenancies Commission simply took over the courts' traditional role of adjudicating contractual disputes between landlords and tenants.

In order to overcome the constitutional obstacle posed by section 96, any new proposal for the creation of an administrative agency in the residential tenancies area must, as discussed earlier, meet the third part of the *Residential Tenancies* test. In other words, responsibility for adjudicating landlord and tenant disputes cannot be the sole or dominant function of the proposed administrative agency. Rather, adjudication must constitute only one part of the agency's administrative functions, and must occur within a broader regulatory framework in the pursuit of broader administrative objectives.

¹⁰⁴ In the Matter of the Board of Inquiry appointed under s. 28(1) of the *Ontario Human Rights Code*, R.S.O. 1990, c. H-19 between *Human Rights Commission* and *Dawn Kearney, Julie Lupo and Catarina Luis and Bramalea Limited, The Shelter Corporation, Creccal Investment Ltd., L. Diegeso and Mary Gravelle*; see also Centre for Equality Rights in Accommodation, "Income Discrimination in Housing: Upcoming Board of Inquiry Hearings" (Toronto: Centre for Equality Rights in Accommodation, April 1994).

The preceding part of the paper contends that to significantly improve the quality of dispute resolution in this area, any new landlord and tenant regime must do more than simply displace the adjudication of claims to a different setting. Rather, adjudication must become only one among a number of administrative objectives and functions of the residential tenancies agency. To be effective, concerted efforts must be made by the agency to modify the regulatory environment within which disputes arise. Aggressive public information and education measures must be undertaken at the community level, in order to increase awareness among landlords and tenants about their respective rights and obligations under the *Landlord and Tenant Act* and related legislation, such as the Ontario *Human Rights Code*.¹⁰⁵ A foremost administrative objective must be to avert unnecessary disputes and to work to improve the overall climate of landlord-tenant relations in the province.

Once disputes do occur, they must be actively managed, rather than simply adjudicated. In particular, adequate investigative structures, a well-balanced and authoritative mediation process, and ongoing monitoring and enforcement mechanisms must be designed and put in place. As discussed earlier, this expansion of the role of the agency beyond traditional adjudication of the type now provided by the courts is particularly necessary in view of the serious under-representation of tenant claims in the system. Changes must be made at all levels so that tenants are more able to bring complaints forward, including complaints of a more systemic nature, and to have these properly addressed. Such an expansion of the agency's role and responsibilities is also necessary to respond effectively to widespread and well-founded complaints that the current judicial process does not produce optimal outcomes either for landlords or tenants.

Because it would not see its primary function as the adjudication of disputes, but rather as the regulation and management of the residential tenancy environment in a more global way, an agency of the sort proposed in the preceding section of the paper would be more likely to meet the test set out by the Supreme Court in the *Residential Tenancies* case. Adjudication would not be the sole or dominant function of the agency, and providing information, education, and mediation services would not be ancillary or unrelated aspects of the tribunal's responsibilities. By consolidating the tasks proposed for the new administrative agency with those currently performed by rent officers under the *Rent Control Act, 1992*¹⁰⁶ the agency should be more able to meet constitutional objections of the type raised in the *Residential Tenancies* reference.

The remaining measures required to make the reallocation of residential tenancies matters to an administrative agency feasible and worthwhile relate to the issues of judicialization and authoritativeness, raised in the second part of the paper. As previously discussed, the *Statutory Powers Procedure Act* has forced administrative agencies in Ontario to adopt a more judicialized model of decision-making. In order to achieve the procedural advantages described

¹⁰⁵ *Supra* note 55. Sub-section 2(1) of the *Code* provides that:

2.(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.

Subsection 2(2) of the *Code* guarantees the right to freedom from harassment by the landlord, agent of the landlord, or fellow tenant, on the same grounds; see generally J. Keene, *Human Rights in Ontario*, 2d ed. (Toronto: Carswell, 1992) at 29-33.

¹⁰⁶ *Supra* note 29.

in the foregoing section of the paper, the maximum possible flexibility within the limits of the *SPPA* will have to be maintained in procedures for resolving residential tenancies disputes. Otherwise the delays in the current court process may simply be replicated in the new administrative one -- a complaint now made in relation to a number of provincial administrative tribunals.¹⁰⁷ While it is important to ensure that all parties benefit from adequate and effective process-based guarantees, it is clear from the existing system that consistency and substantive fairness do not follow automatically from a judicialized decision-making process.

At the same time, particular care will have to be taken to create an administrative process which is authoritative, in the sense of generating confidence in the parties that it is open, impartial and fair. Serious concern exists in many segments of the residential tenancy community about the potentially adverse impact of moving landlord and tenant disputes from the courts to a provincially created administrative tribunal. While it is widely agreed that the current system for dealing with residential tenancy matters is deficient in many regards, it is feared that a non-judicial process may in fact work against the interests of tenants as the weaker party in most disputes.¹⁰⁸ Because of judges' training and openness to legal and procedural-based arguments,¹⁰⁹ the respect which they command from landlords as well as tenants, and the tradition of judicial impartiality and independence, judges are seen by many as more reliable arbiters of landlord and tenant disputes, given the type of power imbalance which exists in this context. Opposition to the transfer of landlord-tenant disputes out of the courts and into an administrative setting is reinforced by recent experience with the administrative process established under the *Rent Control Act, 1992*.¹¹⁰ Critics point to serious delays, evidential and procedural hurdles, poorly trained hearing officers, wide intra-provincial discrepancies in procedural standards and the substance of decisions, and general underfunding of the system. This experience leads to reasonable scepticism about the likelihood that a residential tenancies tribunal would be substantially different.

¹⁰⁷ See for example complaints about excessive delays in proceedings before the Ontario Human Rights Commission; Ontario Human Rights Code Review Task Force, *Achieving Equality*, *supra* note 54 at 20-28; see also "Workshop Reports: Administrative Tribunals" in Hutchinson, *Access to Civil Justice*, *supra* note 2 at 348-349.

¹⁰⁸ A number of these concerns have been expressed by the Ontario Legal Clinics' Housing Issues Committee; see for example the transcript of the Civil Justice Review Fundamental Review Group Anti-Poverty Groups consultation meeting, December 8, 1994, on file with the Ontario Ministry of the Attorney General, Policy Development Division.

¹⁰⁹ An example of this is provided in the recent case of *Ali Hasan v. 260 Wellesley Residence Ltd and Local Registrar* (27 June 1995), Toronto 32/95, where the Ontario Court (General Division) agreed that the Registrar's power to sign default judgments under section 113(7) of the *Landlord and Tenant Act*, did not include the authority to weed-out "non-existent" disputes. The court concluded, at 29, that:

... once it had become apparent to the Registrar that [the tenant] was appearing to dispute the landlord's claim, she should have referred the matter to a judge. She ought not to have conducted a mini-hearing with the parties to satisfy herself of the existence of a "real" dispute. By doing so she exceeded her jurisdiction.

In the court's view, a contrary interpretation of the section would "work a fundamental unfairness upon tenants who seek to dispute claims" and would also, by conferring a judicial power upon the Registrar, violate section 96 of the *Constitution Act, 1867*. On the issue of costs (which the Registrar had awarded in favour of the landlord in the amount of \$160) the Court found, at 34, that Registrars also lacked the power to award or to fix costs or disbursements under section 113(7) of the *Act*.

¹¹⁰ *Supra* note 29.

A number of measures are clearly required to respond to these concerns and to guarantee that a new administrative structure for dealing with landlord and tenant disputes works effectively, and is perceived as doing so. The first relates to the appointments process. Those appointed to the new administrative agency must reflect the diversity of Ontario's residential tenancy population, must possess demonstrated expertise and sensitivity to issues of concern to both landlords and tenants, and must be able to make decisions in a fair, reasoned and impartial way. Those appointed must be well-trained, and capable of dealing with both legal and policy issues with a high level of professionalism and competence. If the agency becomes or is seen to become patronage-ridden or otherwise skewed in favour of one set of interests, the system will quickly lose all credibility and effectiveness.

In addition, any new administrative agency with responsibility for dealing with landlord and tenant disputes must be adequately funded. Reducing the cost to government of dealing with residential tenancies disputes cannot be the primary motivation for moving to an administrative system. Such a system is bound to develop the same problems as currently exist within the rent review context. To present an effective alternative to the courts, any new administrative tribunal must have sufficient funding not only to hire an adequate number of competent and well-trained personnel, but also to provide the other services, such as legal advice and mediation services, discussed earlier.

Creating a structure that is effective and staffing it with qualified and well-trained personnel is the best way of ensuring that the residential tenancies agency becomes the preferred forum for resolving landlord and tenant disputes. It may be that these attractions will in and of themselves avert the need to enact formal measures to prohibit access to the courts as a first recourse in landlord-tenant matters. However, because the court system as it now operates has been shown to be so unresponsive to tenant interests, it may be necessary to limit access to the courts, except on appeal from decisions by the administrative agency on questions of law, in order to ensure landlords' participation in the new system.

6. THE REALLOCATION OF CIVIL DISPUTES FROM THE COURTS TO ADMINISTRATIVE AGENCIES: OTHER EXAMPLES

On the basis of the criteria developed in the third part of the paper, it is possible to identify three additional areas in which disputes now being dealt with by the courts could better be resolved through an administrative process. These include the environment, wrongful dismissal, and professional malpractice. As in the case of residential tenancies, the existing allocation of dispute resolution responsibility to the civil courts in each of these areas poses significant problems. Likewise, there are significant advantages to be gained by transferring responsibility for dealing with these disputes to an administrative agency.

(a) ENVIRONMENTAL DISPUTES

A vast literature exists on the deficiencies of the civil court system for resolving environmental disputes.¹¹¹ In a study proposing the creation of a comprehensive compensation

¹¹¹ See for example D. Estrin & J. Swaigen, *Environment on Trial - A Guide to Ontario Environmental Law and Policy*, 3d ed. (Toronto: Emond Montgomery, 1993); R. Cotton & N. Johnson, "Avenues for Citizen Participation in the Environmental Arena: Some Thoughts on the Road Ahead" (1992) 41 *University of New Brunswick Law Journal* 131; J. Benidickson, "Environmental Law Survey (1980-92)" (1992) 24 *Ottawa Law Review* 733, (1992) 24 *Ottawa Law Review* 123; J. Swaigen, "The Role of the Civil Courts in Resolving Risk and Uncertainty in

regime for victims of pollution-related damage, John Swaigen provides the following summary:

... disadvantages include the need to prove causation, cost, delay, difficulties in establishing the appropriate cause of action and basis of liability, restrictions on the scope of damages, difficulties in measuring damages, the lack of availability of class actions, and inadequate limitation periods.¹¹²

Environmental cases are generally complex and lengthy -- raising difficult evidential and information-related issues with which judges and the civil court system may be ill-equipped to deal.¹¹³ An imbalance of power and knowledge often exists between the parties, particularly where the defendant is the government or a corporate polluter -- another problem to which the civil court system cannot adequately respond. As Swaigen suggests, cost is another serious barrier to bringing environmental cases before the courts. An individual undertaking an environmental action will be responsible for paying his or her own lawyer's fees, a substantial portion of those of the opposing party in the event the action is unsuccessful, and any expert witness fees. Even when a party is successful, there are limits to the type and amount of damages and other remedies which a court can award. All of these factors increase the risks and operate as a strong deterrent to the use of the civil courts for resolving environmental disputes.

While provincial laws, such as the *Environmental Protection Act*,¹¹⁴ the *Environmental Assessment Act*,¹¹⁵ and the *Environmental Bill of Rights, 1993*,¹¹⁶ have brought important and positive changes in this area, many problems persist. For example, sub-section 84(1) of the *Environmental Bill of Rights* creates a right of action for violation of provincial environmental protection laws. However sub-section 84(7) prevents such actions from being brought as class proceedings under the provincial *Class Proceedings Act, 1992*.¹¹⁷ And, under sub-section 84(10) of the *Environmental Bill of Rights*, all the ordinary rules of court apply. Similarly, while the provincial *Intervenor Funding Project Act*¹¹⁸ permits the award of funding to

Environmental Law" (1990) 1 *Journal of Environmental Law & Policy* 199; Canadian Bar Association Sustainable Development Committee, *Sustainable Development in Canada: Options for Law Reform* (Ottawa: Canadian Bar Association, 1990); R. Anand & I.G. Scott, "Financing Public Participation in Environmental Decision Making" (1982) 60 *Canadian Bar Review* 81; J.Z. Swaigen, *Compensation of Pollution Victims in Canada - A Study Prepared for the Economic Council of Canada* (Ottawa: Supply and Services Canada, 1981); J.P.S. MacLaren, "The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?" (1972) 3 *Osgoode Hall Law Journal* 505; P. Emond, "Environmental Law and Policy - A Retrospective Examination of the Canadian Experience" in I. Bernier & A. Lajoie, Res. Coord., *Consumer Protection, Environmental Law and Corporate Power* (Toronto: University of Toronto Press, 1985) 89 at 103-107.

¹¹² Swaigen, *Compensation of Pollution Victims in Canada*, *ibid.* at 27.

¹¹³ See for example S.L. Smith, "Science in the Courtroom" (April/May 1988) 15:2 *Alternatives* 18.

¹¹⁴ R.S.O. 1990, c. E.19.

¹¹⁵ R.S.O. 1990, c. E.18.

¹¹⁶ S.O. 1993, c. 28; see generally P. Muldoon & R. Lindgren, *The Environmental Bill of Rights - A Practical Guide* (Toronto: Emond Montgomery, 1995).

¹¹⁷ S.O. 1992, c. 6.

¹¹⁸ R.S.O. 1990, c. I.13; for a discussion of the *Act* see M.I. Jeffery, "Ontario's Intervenor Funding Project Act" (1989) 3 *Canadian Journal of Administrative Law and Practice* 69; Valiante & Bogart, "Funding Citizen

intervenor in environmental assessment proceedings, no such funding is available to support public participation in environmental cases brought under the *Environmental Bill of Rights* or in common law actions.

Transferring responsibility for resolving environmental disputes from the courts to an administrative agency would meet all of the criteria set out in the third part of the paper. The functional flexibility of an administrative agency would give it important advantages in the investigation of complaints, in developing measures designed to redress power imbalances between the parties, in designing and implementing mediation and conciliation processes, and in remedial, enforcement and supervisory functions. Appointments could be made among persons with special expertise in the environmental area, in order to increase the agency's ability to deal with the complex factual and scientific issues which often arise in environmental cases. Procedures could be tailored to meet particular problems and needs. Measures could be taken to reduce the financial burden of bringing environmental actions forward, as well as to encourage and support broader public and interest group participation in decision-making.¹¹⁹

Several administrative agencies with environmental mandates are already in existence in the province. These include the Environmental Appeal Board, which hears appeals from decisions by the provincial Environmental Ministry, the Environmental Assessment Board, which conducts public hearings on major projects having a potentially adverse environmental impact, and the Environmental Compensation Corporation, which administers a compensation scheme under the *Environmental Protection Act* for victims of environmental spills, among others.¹²⁰ Because of the breadth of provincial regulatory activity in the environmental area, section 96 related concerns should be relatively easy to address, particularly if the agency is designed to supplement rather than to supplant the courts as a forum for dealing with private environmental actions.

As in the residential tenancies case, any new environmental tribunal will have to be staffed by highly qualified and well-trained individuals and will have to be adequately funded, in order to overcome the problems of administrative authoritativeness discussed in the second part of the paper. By consolidating jurisdiction to address environmental disputes not currently subject to administrative oversight with those that are, individuals may be afforded more effective recourse for environmental complaints, particularly if the objective is to remedy harm done to the environment rather than simply to secure financial compensation for individual victims. Providing a more economical, expeditious and effective mechanism for resolving environmental disputes would not only serve the parties involved, but would also promote the public interest in better protecting a healthful environment in Ontario.

(b) WRONGFUL DISMISSAL

Wrongful dismissal of non-unionized employees is another area in which legal recourse under the current civil court system may not be a realistic option in many situations. Like residential tenants, because of their economic vulnerability and unequal bargaining power,

Participation in Administrative Decision Making", *supra* note 15; J.F. Castrilli, "Intervenor Funding: Intervenor Funding Project Act, 1988" in *Environmental Assessment and Environmental Assessment Boards* (Mississauga: Insight Press, 1990) 25.

¹¹⁹ For some of the reform proposals which have been made on these issues, see note 110 *infra*.

¹²⁰ For a summary of the functions of the various provincial agencies involved in the environmental area, see Ontario, *Guide to Agencies, Boards and Commissions*, *supra* note 5 at 187-202.

non-unionized employees may choose not to go to court to dispute a wrongful dismissal. Even in cases where the monetary amount is significant for the individual employee, the cost and delays of litigation may preclude court action for many -- particularly for those in lower-paid employment. This is another situation in which an expedited, less intimidating dispute resolution process, with greater investigative capacities and a more specialized and diverse group of decision-makers, would have important advantages.

Under the current provisions of the provincial *Employment Standards Act*,¹²¹ an employment standards officer has the power to order an employer to pay compensation or to reinstate an employee wrongfully dismissed under a number of circumstances, including because she or he took a pregnancy or parental leave.¹²² Under section 50(2) of the *Occupational Health and Safety Act*,¹²³ the Ontario Labour Relations Board has jurisdiction to review the dismissal of non-unionized employees because they acted in compliance with, or sought to have the *Act* enforced. Once again, bearing in mind the constitutional constraints imposed by section 96, an expansion of the Ontario Labour Relations Board's mandate to include wrongful dismissal, or the consolidation of all employment matters involving non-unionized employees into a single provincial agency might be considered.¹²⁴ In addition to meeting the criteria developed in the third part of the paper, moving wrongful dismissal claims out of the courts and into an administrative agency such as the Ontario Labour Relations Board would have the additional advantage of remedying the current inequity in access to justice for unionized versus non-unionized employees, and for those complaining of instances of wrongful dismissal which do not infringe the *Employment Standards Act* or *Ontario Human Rights Code*,¹²⁵ as opposed to those which do.

(c) PROFESSIONAL MALPRACTICE

Professional malpractice, involving lawyers, doctors, or other groups providing professional services, is another area in which recourse to the courts may not be a viable

¹²¹ R.S.O. 1990, c. E.14. For a general discussion of the law in this area, see J.R. Sproat, *Employment Law Manual: Wrongful Dismissal, Human Rights and Employment Standards* (Toronto: Carswell: 1992); B.A. Grosman & J.R. Martin, *Employment Law in Ontario: A Guide for Employers and Employees* (Aurora: Canada Law Book, 1991); S.D. Saxe, *Ontario Employment Law Handbook: An Employer's Guide*, 3d ed. (Toronto: Butterworths: 1992).

¹²² *Employment Standards Act*, *ibid.* note 120 s. 45. Other circumstances include where an employee refuses to take a lie-detector test (s. 48); where an employee refuses to work on a statutory holiday (s. 51); and where an employer is obliged to respect a court ordered garnishment order in relation to an employee's wages (s. 56.2).

¹²³ R.S.O. 1990, c. O.1.

¹²⁴ Such a tribunal was found valid in Nova Scotia by the Supreme Court of Canada in its decision in *Sobeys Stores Ltd. v. Yeomans* [1989] 1 S.C.R. 238. The Court held, at 282, that although the provincial Labour Standards Tribunal was exercising adjudicative functions within the jurisdiction of section 96 courts at the time of Confederation, these were permissible as "a necessarily incidental aspect of the broader policy goal of providing minimum standards of protection for non-unionized employees". See generally R.L. Heenan, *Wrongful Dismissal of Non-Union Employees: Arbitral Remedies* (Kingston: Industrial Relations Centre, Queen's University, 1992).

¹²⁵ Section 5 of the *Human Rights Code*, *supra* note 55, guarantees the right to equal treatment in employment and to freedom from workplace harassment "because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap."

option in many situations.¹²⁶ Unless harms or losses suffered are major, the cost of civil litigation may be a serious or even an insurmountable obstacle to bringing a professional malpractice claim. Imbalances of power in professional relationships, monopoly of information, and the psychological impact of becoming involved in adversarial proceedings in this context, are all strong deterrents to an individual contemplating a civil court action for professional malpractice.

Transferring responsibility for dealing with professional malpractice disputes to an administrative agency would present considerable advantages from a public perspective. An administrative agency can be granted the expanded investigative and powers necessary to redress the information and power imbalances which exist between the parties in most professional-client relationships. Creation of an administrative agency would also allow for the appointment of decision-makers with greater expertise and familiarity with the issues involved in this area, as well as the establishment of a more comprehensible and expeditious process for resolving complaints, including through orders for monetary compensation of malpractice victims.

At present, regulation of professional standards and practices in Ontario occurs largely through the mechanism of professional self-regulation.¹²⁷ Self-regulating professional bodies such as the Law Society of Upper Canada for Ontario lawyers,¹²⁸ and the Ontario College of Physicians and Surgeons for Ontario doctors,¹²⁹ have the power to license their members, and to discipline them in the event of breach of professional standards. Because of the lack of direct provincial regulatory oversight and control in this area, it may be extremely difficult for an administrative agency charged with resolving professional malpractice disputes to meet the *Residential Tenancies* test, unless the agency is designed to simply to supplement rather than to replace civil court jurisdiction in relation to professional malpractice claims.

7. CONCLUSION

In the case of residential tenancies, as in the other examples reviewed briefly above, a transfer of responsibility from the courts to an administrative agency meets the criteria developed in the third part of the paper, and has the potential to promote the civil justice review's objectives of reducing delay and costs in resolving disputes, and enhancing the quality of decision-making and access to justice in the province. As discussed in the second part of the paper, however, judicial interpretation of section 96 of the *Constitution Act, 1867* remains a major obstacle to any attempt to remove adjudicative responsibility from the superior courts.

¹²⁶ See for example the finding in W.A. Bogart & N. Vidmar, "Problems and Experience With the Ontario Civil Justice System: An Empirical Assessment" in Hutchinson, *Access to Civil Justice*, *supra* note 2 at 20-21; J.R.S. Prichard, *Liability and Compensation in Health Care - A Report to the Conference of Deputy Ministers of Health of the Federal/Provincial Territorial Review on Liability and Compensation Issues in Health Care* (Toronto: University of Toronto Press, 1990).

¹²⁷ See generally J.T. Casey, *The Regulation of Professions in Canada* (Toronto: Carswell, 1994); B.M. Knoppers, ed., *Professional Liability in Canada* (Cowansville: Les Éditions Yvon Blais Inc., 1988).

¹²⁸ Professional self-regulation for lawyers is provided for under the terms of the *Law Society Act*, R.S.O. 1990, c. L.8.

¹²⁹ Self-regulation for physicians is provided for under the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18 and the *Medicine Act, 1991*, S.O. 1991, c. 30.

The courts have demonstrated great unwillingness to cede this terrain to others, and there is little reason to believe that judicial attitudes on this issue will soon change.

In addition, Ontario, like other parts of Canada and the United States, is in the grips of a growing anti-government, anti-regulatory sentiment. Rightly or wrongly, civil courts are widely perceived by the public as non-governmental, non-political entities. Peter Russell has made the comment, in connection with the *Canadian Charter of Rights and Freedoms*, that:

The apparent popularity of increasing the power of judges at the expense of the power of politicians and officials demonstrates the extent to which Canadians, at this point in their history, regard their judges as less tied to the interests of government; they are seen in a fundamental sense as being less political and more trustworthy than those holding executive and legislative positions.¹³⁰

In a decision relating to the application of the *Charter* to court orders in the *Dolphin Delivery* case, Justice McIntyre argued that:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action.¹³¹

This suggestion, that judicial orders made by common law courts are fundamentally different from the regulatory actions of government, and that courts are not in fact part of government in any legally relevant sense, would ring true for many Ontarians. In view of this, any effort to move a matter out of the "private" realm of the civil courts, and into the "public" realm of administrative agencies is likely to meet with considerable resistance. Such resistance will only be reinforced by prevailing public attitudes towards the quality of justice dispensed by administrative tribunals, as discussed earlier. Although many civil disputes might be resolved more effectively and expeditiously in an administrative agency setting, transfers of responsibility of the kind discussed above will be perceived by many as an increase in regulatory intervention, and as seriously objectionable on that basis.

In her study of alternative dispute resolution in the landlord-tenant context, Julie Macfarlane took as a given that no major legislative changes are likely to be undertaken in this area, and that the creation of a new administrative agency to oversee residential tenancies disputes in the province is unlikely.¹³² As a consequence, her recommendations for a new process for mediating residential tenancies disputes were made with a view to being integrated into the current civil court system.¹³³ In the environmental area, many changes have also been proposed to make the existing court system more accessible to ordinary litigants.¹³⁴ In the case of wrongful dismissal, cases are now being referred to the ADR Centre in Toronto as part of

¹³⁰ Russell, *The Judiciary in Canada*, *supra* note 7 at 35.

¹³¹ *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 at 600.

¹³² Macfarlane, *Final Report*, *supra* note 62.

¹³³ In its first report, the Civil Justice Review Task Force also considered other possible changes to the existing process for dealing with landlord tenant matters; *First Report of the Civil Justice Review*, *supra* note 54 at 297-392.

¹³⁴ See *infra* note 63.

the Alternative Dispute Resolution Pilot Project,¹³⁵ and many similar efforts are being discussed and implemented within the existing civil court structure in other areas.¹³⁶

Clearly, the civil court system is not impervious to reform. The revised appointments process for Ontario provincial court judges provides a good illustration of the ability of the civil court system to respond to changing social standards and expectations about the quality of justice in the province.¹³⁷ In the landlord-tenant as in the other areas discussed above, many positive changes could be made to remedy problems of inefficiency, unfairness, cost and delay within the existing court process for dealing with these disputes. Given the current legal and political climate in the province, an approach which attempts to import administrative values of flexibility and adaptability into the existing court system may, in the final analysis, prove a more fruitful avenue for responding to problems in Ontario's civil justice system than one which seeks to bypass the civil courts altogether.

¹³⁵ Practice Direction, Toronto Region - Alternative Dispute Resolution Pilot Project" (1994) 16 O.R. (3d) 481; see also Julie Macfarlane, "Evaluation of the General Division Alternative Dispute Resolution Centre in Toronto" (Faculty of Law, University of Windsor) [unpublished work in progress].

¹³⁶ For example, the integration of ADR procedures into the current system for resolving construction lien disputes was supported by the Civil Justice Review Task Force, *supra* note 12 at 303-306; see also Attorney General's Advisory Committee on Alternative Resolution of Construction Disputes, *Too Many Disputes! Too Much Litigation! - Dispute Resolution Opportunities for the Construction Industry* (Toronto: Ministry of the Attorney General, 1994). In the commercial area, the Ontario Court (General Division) has used special procedures for dealing with actions, applications and motions involving bankruptcy proceedings and matters arising under a number of commercial and corporate statutes since 1991; see "Practice Direction - The Commercial List" (1993) 13 O.R. (3d) 453.

¹³⁷ See generally "The Appointment of Judges" (1989) 13 *Provincial Judges Journal* 12; Judicial Appointments Advisory Committee, *Final Report and Recommendations* (Toronto: Ministry of the Attorney General, 1992).

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